(9)

No. 93-1677-CFX
Status: GRANTED

Title: Oklahoma Tax Commission, Petitioner
v.
Jefferson Lines, Inc.

Docketed:
April 21, 1994

Court: United States Court of Appeals for the Eighth Circuit

Counsel for petitioner: Johnston, Stanley Phillip

Counsel for respondent: DeRuyter, Stephen D.

Ptn due & mld 4-21-94, see ml label re dkt dt.

| Entry | Date | Note | Proceedings and Orders |
|---|---|---|---|
| 1 | Apr 21 1994 | G | Petition for writ of certiorari filed. |
| 3 | May 24 1994 | X | Brief of respondent Jefferson Lines, Inc. in opposition filed. |
| 2 | May 25 1994 | | DISTRIBUTED. June 10, 1994 (Page 4) |
| 4 | Jun 13 1994 | | Petition GRANTED. |
| | | | ******************************************************** |
| 6 | Jul 11 1994 | | Order extending time to file brief of petitioner on the merits until August 11, 1994. |
| 8 | Aug 10 1994 | | Joint appendix filed. |
| 7 | Aug 11 1994 | | Brief amici curiae of National Conference of State Legislatures, et al. filed. |
| 9 | Aug 11 1994 | | Brief of petitioner Oklahoma Tax Commission filed. |
| 10 | Aug 15 1994 | | Record filed. |
| | | * | Partial record proceedings United States Court of Appeals for the Eighth Circuit. |
| 11 | Aug 17 1994 | | Record filed. |
| | | * | Original record proceedings United States District Court for the District of Minnesota. |
| 12 | Sep 9 1994 | | Brief of respondent Jefferson Lines, Inc. filed. |
| 13 | Sep 12 1994 | | Brief amicus curiae of American Bus Association filed. |
| 14 | Sep 12 1994 | G | Motion of Greyhound Lines, Inc. for leave to file a brief as amicus curiae filed. |
| 16 | Oct 4 1994 | | CIRCULATED. |
| 17 | Oct 7 1994 | | SET FOR ARGUMENT MONDAY, NOVEMBER 28, 1994. (1ST CASE). |
| 18 | Oct 11 1994 | | Motion of Greyhound Lines, Inc. for leave to file a brief as amicus curiae GRANTED. |
| 19 | Nov 28 1994 | | ARGUED. |

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In The

# Supreme Court of the United States

OCTOBER TERM, 1993

STATE OF OKLAHOMA, EX REL.
OKLAHOMA TAX COMMISSION, PETITIONER

*v.*

JEFFERSON LINES, INC., RESPONDENT

*PETITION FOR A WRIT OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE EIGHTH CIRCUIT*

## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether the State of Oklahoma may constitutionally impose on the in-state purchaser, and require the in-state vendor to collect, a sales tax on the purchase of bus transportation sold within the State, measured by the full purchase price of the ticket, even though the ultimate destination or a portion of the route to be travelled extends beyond the state's borders.

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STATE OF OKLAHOMA, EX REL.
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v.

JEFFERSON LINES, INC., RESPONDENT

---

***PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT***

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Petitioner, State of Oklahoma, ex rel. Oklahoma Tax Commission, respectfully prays that a writ of certiorari be issued to review the order and judgment of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on January 21, 1994.

## OPINIONS BELOW

The opinion of the Eighth Circuit Court of Appeals is reported as *State of Oklahoma ex rel. Oklahoma Tax Commission v. Jefferson Lines, Inc. (In*

*re Jefferson Lines, Inc.)*, 15 F.3rd 90 (8th Cir. 1994), and is reprinted in the Appendix hereto, at A-1.

The Memorandum and Order of the United States District Court for the District of Minnesota, Third Division, has not been reported. It is reprinted in the Appendix hereto, at A-9. The Order of the United States Bankruptcy Court for the District of Minnesota, Third Division, is not reported and is reprinted in the Appendix at A-17.

## JURISDICTION

The opinion of the Court of Appeals for the Eighth Circuit was entered on January 21, 1994. No petition for rehearing was sought. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Commerce Clause of the United States Constitution, Article I, Section 8, Clause 3, provides:

The Congress shall have Power . . .

* * * *

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;



Pertinent sections of the Oklahoma Sales Tax statutes are as follows:

OKLA. STAT. tit. 68, § 1354(1) (Supp. 1988):

There is hereby levied upon all sales, not otherwise exempted in the Oklahoma Sales Tax Code, an excise tax of four percent (4%) of the gross receipts or gross proceeds of each sale of the following:

(A) Tangible personal property;

* * * *

(C) Transportation for hire to persons by common carriers, including railroads both steam and electric, motor transportation companies, taxicab companies, pullman car companies, airlines, and other means of transportation for hire;

OKLA. STAT. tit. 68, § 1361 (Supp. 1988):

(A) The tax levied by this article shall be paid by the consumer or user to the vendor as trustee for and on account of this state. Each and every vendor in this state shall collect from the consumer or user the full amount of the tax levied by this article, or an amount equal as nearly as possible or practicable to the average equivalent thereof. Every person required to collect any tax imposed by this article, and in the case of a cor-

poration, each principal officer thereof, shall be personally liable for said tax.

## STATEMENT OF THE CASE

### 1. Nature of the Controversy

The Oklahoma Sales Tax Code imposes a tax, to be paid by the purchaser and collected by the vendor, upon the sale of tangible personal property and certain services, including transportation for hire by common carriers such as bus companies, where such sales occur within the State. The vendor becomes liable if the vendor fails to collect or remit the tax. OKLA. STAT. tit. 68, §§ 1354(1), 1361 (Supp. 1988).

Jefferson Lines, Inc. ("Jefferson") is a common carrier providing bus service in Oklahoma as well as other states. Jefferson sells tickets in Oklahoma from various locations across the state. Jefferson's ticket sales can be classified into two categories. The first category consists of tickets sold in Oklahoma for transportation that both originates and terminates within the State of Oklahoma. The second category consists of tickets sold in Oklahoma for transportation originating in Oklahoma and terminating in some other state.

During the periods in question, Jefferson collected and remitted the Oklahoma sales tax only on ticket sales involving solely intrastate travel. Jefferson reported total sales made in Oklahoma on its



Oklahoma sales tax report. Jefferson then deducted all sales where the ultimate destination was outside the State of Oklahoma. Taxes were not collected or remitted on those sales. The Oklahoma Tax Commission, conducting a routine office audit of Jefferson's sales tax reports for September and October, 1989, and January and February, 1990, discovered Jefferson was not collecting or remitting tax on sales made in Oklahoma where the bus routes involved travel outside the State. The Commission disallowed the sales deduction taken by Jefferson on its sales tax reports and determined the amount of sales tax due on the deducted sales.

### 2. The Proceedings Below

Jefferson filed its petition for voluntary relief under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the District of Minnesota, Third Division, on October 27, 1989. On relation of the Tax Commission, the State of Oklahoma filed proofs of claim for priority taxes and administrative claims for the sales taxes that Jefferson, as vendor, was required to collect, but did not, on the bus tickets sold in Oklahoma. The bankruptcy court's jurisdiction to hear and decide those claims is provided by 28 U.S.C., § 157.

Following Jefferson's objection to the Commission's claims, the bankruptcy court issued its order disallowing the Commission's claims for sales taxes due on the sale of transportation where the ultimate bus route involved a destination outside the State,

based upon the court's conclusion that such taxes violated the Commerce Clause of the United States Constitution.

On appeal, the district court affirmed. That court, examining the tax in light of *Complete Auto Transit, Inc. v. Brady*, 403 U.S. 274 (1977), concluded that, while Oklahoma was the only state that could tax the *purchase* of the bus tickets in question and the tax was therefore internally consistent, the court also concluded that because the tax is not apportioned according to the miles traveled in Oklahoma, it was not externally consistent, and therefore not "fairly apportioned," thus violating the Commerce Clause.

The Eighth Circuit affirmed the district court, concluding Oklahoma's sales tax was equatable to the tax at issue in *Central Greyhound Lines v. Mealy*, 334 U.S. 653 (1948) and, therefore, Oklahoma had to apportion its tax based on bus miles traveled in Oklahoma.



## REASONS FOR GRANTING THE WRIT

### THE OPINION BELOW CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT AND THE OKLAHOMA SUPREME COURT, WHICH HAVE UPHELD THE STATES' POWER TO TAX A DISCRETE TRANSACTION WHICH OCCURS SOLELY WITHIN THE STATE'S BORDERS.

In *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 97 S.Ct. 1076, 51 L.Ed.2d 326 (1977), this Court set forth the test for determining whether a state tax improperly impedes Congress' authority to regulate commerce between the states. Under the four-prong test of *Complete Auto*, a state tax is constitutional if: (1) the tax is related to an activity with a substantial nexus with the taxing state; (2) is fairly apportioned; (3) does not discriminate against interstate commerce; and (4) is fairly related to the services provided by the state. *Id.*, at 279, 97 S.Ct. at 1079.

In *Goldberg v. Sweet*, 488 U.S. 252, 261 (1989) the Court said that to determine whether a tax is fairly apportioned it must be examined for internal and external consistency. To be internally consistent, a tax "must be structured so that if every State were to impose an identical tax, no multiple taxation would result." The external consistency test "asks whether

the State has taxed only that portion of the revenues from [an] interstate activity which reasonably reflects the in-state component of the activity being taxed." *Id.*, at 262.

The Opinion below correctly concluded that Oklahoma's sales tax on the in-state sale of bus tickets satisfied the internal consistency test. However, the Eighth Circuit then concluded that the tax failed the external consistency test. In doing so, however, the court erroneously equated Oklahoma's sales tax, imposed solely on the in-state purchaser, with the gross income tax imposed on the bus company in *Central Greyhound Lines v. Mealy*, 334 U.S. 653 (1948), and based its decision entirely upon that case. The court, however, completely disregarded this Court's *applicable* decisions in *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U.S. 33 (1940); *Wardair Canada, Inc. v. Florida Dept. of Revenue*, 477 U.S. 1 (1986); *Itel Containers Int'l Corp. v. Huddleston*, 507 U.S. ___, 113 S.Ct. 1095 (1993); and *Goldberg*.

*Central Greyhound* is totally inapposite to this case, and was wrongly relied upon by the courts below. That case involved an *income* tax on the bus company's gross proceeds or total revenues, while the case at bar involves a *sales* tax on the consumer, *measured by* the amount of the purchase. Central Greyhound conducted bus routes that ran primarily in New York but crossed into New Jersey and Pennsylvania for a short period. New York imposed an income tax on the bus company. The amount of



tax due was based on the bus company's gross receipts or total income earned. This Court stated the tax was improper because part of the bus company's income was generated by bus routes occurring outside New York. In essence, New York was attempting to collect income tax on income generated outside the state. This case, however, involves a sales tax on the consumer—not an income tax on the bus company. Oklahoma's only requires that Jefferson *collect* the tax from its Oklahoma consumer. Jefferson became liable only because it failed to collect the tax.

The Oklahoma Supreme Court in interpreting Oklahoma sales tax has determined that the taxable event is the sale itself, and that the sales tax is applicable only when the sale occurs in Oklahoma. *Liberty Steel Co. v. Oklahoma Tax Commission*, 554 P.2d 8, 10 (Okla. 1976). The Oklahoma Court has further said that the sales tax is not a tax on property (the thing purchased) or a tax on income. *Oklahoma Tax Commission v. Sisters of The Sorrowful Mother*, 97 P.2d 888, 892 (Okla. 1940).

Unlike the gross income tax in *Central Greyhound*, levied on the company's revenues from activities conducted in other states, Oklahoma's sales tax is levied on the consumer, and is imposed solely with respect to that consumer's activity *within* the State.

The Oklahoma Supreme Court in *Koch Fuels v. State ex rel. Tax Comm'n*, 862 P.2d 471 (Okla. 1993), analyzed Oklahoma's sales tax under the *Complete*

*Auto* test in the face of a Commerce Clause challenge raising many the same arguments as made here, and, insofar as pertinent hereto,[1] found those statutes constitutional. The well-reasoned opinion of the Oklahoma Court studiously follows, and is completely consistent with, the applicable pronouncements of this Court. *Koch Fuel* involved the sale of fuel oil, with the contract between the parties designating Tulsa, Oklahoma as the point of delivery of the fuel. The fuel was actually delivered outside the State of Oklahoma at various points along an interstate pipeline. The Oklahoma Court reasoned that because a sale is an insular and discrete transaction that can occur only in one place, the sale is taxable only by the state in which it occurs.

Likewise, this Court has traditionally viewed local sales taxes favorably in the face of Commerce Clause challenges. In *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U.S. 33 (1940), the tax at issue was a New York City sales tax imposed on the sale of goods. New York City levied a tax on the consumer that was collected by the retailer at the time of the

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[1] The Oklahoma court did find that a statutory exemption from sales tax on goods manufactured in Oklahoma and transported to another state discriminated against interstate commerce, and vacated the tax assessment for that reason, in that case only. That element is not present in the case before this Court. Further, having struck down that particular exemption, the court ruled that, thereafter, there was and would be no constitutional impediment to imposition of the tax in the same type of case. 862 P.2d at 481.



sale. In *McGoldrick*, a Pennsylvania corporation maintaining a sales office in New York entered into a contract with a New York buyer for the sale of coal. The coal was mined in Pennsylvania and shipped to New York through channels of interstate commerce. The coal was not shipped until the parties entered into the sales contract. The seller challenged the New York City sales tax, alleging it infringed upon the Commerce Clause due to the fact the goods were shipped through interstate commerce following the sale. This Court held the New York City sales tax valid because the practical effect of the tax did not subject interstate commerce to a greater burden, or to the danger of a greater burden, than would result if no interstate commerce were involved. *Id.*, at 54, 57-58.

The economic effect of Oklahoma's sales tax is identical to the economic effect of the New York City sales tax in *McGoldrick*. Regardless of the subsequent interstate bus route, it is the *sale* of transportation which creates the taxable transaction. The sale of transportation occurs solely in Oklahoma. This Court has stated that the *taxable transaction* determines if a state tax improperly infringes the Commerce Clause. *Colonial Pipeline Co. v. Traigle*, 421 U.S. 100, 95 S.Ct. 1538, 44 L.Ed.2d (1975). Oklahoma's sales tax is levied on the *sale* of transportation and not on the interstate bus route; for that reason, it passes external consistency.

In *Goldberg* the State of Illinois imposed a 5% tax on intrastate telecommunications and also on interstate telecommunications originating or terminating in the state and charged to an Illinois service address, regardless of where the telephone call was billed or paid.

In upholding the Illinois tax under the four-prong test of *Complete Auto*, the Court held that the tax was internally consistent for apportionment purposes, because "if every State taxed only those interstate phone calls which are charged to an in-state service address, only one state would tax each interstate call." *Id.*, 488 U.S. at 261. Here, the same holds true. If every state levied a tax on the sale of bus tickets within the state, only one state could tax each sale. *See, also, Koch Fuels*, 862 P.2d at 479.

As to external consistency, the Court likewise upheld the tax, rejecting the argument that a tax on the gross charge was not fairly apportioned and could likely result in multiple taxation, saying:

> The Director argues that, *because the Tax Act has the same economic effect as a sales tax*, it can be based on the gross charge of the telephone cal. *See, e.g., McGoldrick v. Berwind-White Coal Mining Co.*, 309 U.S. 53, 58, 60 S.Ct. 388, 398 (1940) (sales tax); cf. *D. H. Holmes Co. v. McNamara*, 486 U.S. 24, 31-32, 108 S.Ct. 1619, 1623-1624, 100 L.Ed.2d 21 (1988) (use tax); *Tyler Pipe Industries, Inc. v. Washington Dept. of Revenue*, 483 U.S. 232,



> 251, 107 S.Ct. 2810, 2822, 97 L.Ed.2d 199 (1987) (gross receipts).
>
> We believe that the Director has the better of this argument. *The tax at issue has many of the characteristics of a sales tax.* It is assessed on the individual consumer, collected by the retailer, and accompanies the retail purchase of an interstate telephone call. Even though such a retail purchase is not a purely local event since it triggers simultaneous activity in several States, *cf. McGoldrick, supra*, 309 U.S., at 58, 60 S.Ct. at 398, the Tax Act reasonably reflects the way that consumers purchase interstate telephone calls.

*Goldberg*, 488 U.S. at 262. [Emphasis added.]

Because of the structure of the Illinois tax statute which levied the tax without regard to where a call is billed or paid, the Court reasoned that two states—but only two—could tax the same call: the state in which the customer's service address is located and the state where the call is billed or paid. The Court then held that "[t]his limited possibility of multiple taxation, however, is not sufficient to invalidate the Illinois statutory scheme." *Id.*, at 263-64. The Court in *Goldberg* did observe that to the extent that some other state *might* tax the same call, Illinois' credit provision operated to avoid multiple taxation. *Id.*, at 264, 109 S.Ct. at 590. However, nowhere in *Goldberg* did the Court say that *only* a taxing scheme that provided for such credits could

survive the test of constitutionality. It is axiomatic that where there is *no* possibility of multiple taxation, there is no need for credit provisions. *See, Koch Fuels*, 862 P.2d at 478-479.

The tax at issue here does not merely have "many of the *characteristics* of a sales tax," it *is* a sales tax. It is applied to a retail purchase that is a purely local event. Differing from—and more localized than—the telephone calls in *Goldberg*, the purchase of a bus ticket in Oklahoma does not trigger simultaneous activity in several states, or even in one other state. Here the sale is complete, and taxable, before any transportation of any kind occurs—*or even if no transportation occurs at all.* Travel is not the taxed activity. A bus ticket need not be used for its sale to be taxable.

In like vein, this Court has approved, for Commerce Clause purposes, state sales taxes on sales of goods subsequently used solely in interstate or foreign commerce. In *Wardair Canada, Inc. v. Florida Dept. of Revenue*, 477 U.S. 1 (1986), Florida imposed a state sales tax on all aviation fuel sold within the state. The jet fuel was used in intrastate, interstate and foreign transportation. There, the Court accepted that the sale of fuel was a discrete transaction that could occur in only one location, that no threat of multiple taxation could exist, and that the tax did not contravene the Commerce Clause. *Id.*, at 8–9.

In *Itel Containers International Corporation v. Huddleston*, 507 U.S. _____, 113 S.Ct. 1095 (1993), Tennessee levied a sales tax on the lease in Tennessee of cargo containers which were used solely in foreign commerce. The Court upheld the Tennessee Supreme Court's finding that the state sales tax clearly met the *Complete Auto* four-prong test. 113 S.Ct. at 1104. The Court found the Tennessee sales tax to be "a fair measure of the state's contacts with a given commercial transaction in all four aspects of the *Complete Auto* test." *Ibid.* Justice Scalia, in his concurring opinion, stated the Tennessee tax to be "nothing more than a garden-variety sales tax that clearly does not discriminate against foreign [or interstate] commerce." *Id.*, at 1107 (Scalia, J., concurring).



The Oklahoma sales tax is a "garden-variety" sales tax: It is assessed on the individual consumer, collected by the retailer, accompanies the retail purchase of a bus ticket, and reasonably reflects the way that consumers purchase bus tickets—in a single, discrete event—all as recognized and upheld in *McGoldrick, Goldberg, Itel Containers, Wardair* and *Koch Fuels*. The lower court's finding to the contrary, based upon a mischaracterization of the tax as one on interstate transportation or use *after the sale*, is contrary to the applicable decisions of this Court, and should be reviewed and reversed.

## CONCLUSION

Because the Eighth Circuit Court of Appeals has decided an important question of federal law in conflict with applicable decisions of this Court and of

the highest Court of the State of Oklahoma, review by this Court is urgently required. The petition for a writ of certiorari should be granted.

Respectfully submitted,

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## APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 93-1684MN

| | | |
|---|---|---|
| In re Jefferson Lines, Inc., Debtor; State of Oklahoma ex rel. Oklahoma Tax Commission, Appellant, v. Jefferson Lines, Inc., Appellee. | * | On Appeal from the United States District Court for the District of Minnesota. |

Submitted: November 11, 1993
Filed: January 21, 1994

Before RICHARD S. ARNOLD, Chief Judge, BEAM, Circuit Judge, and JACKSON[1], District Judge.

RICHARD S. ARNOLD, Chief Judge.

[1] The Hon. Carol E. Jackson, United States District Judge for the Eastern District of Missouri, sitting by designation.

In 1989, the Oklahoma Tax Commission sought payment from Jefferson Lines, Inc., the debtor in a Chapter 11 bankruptcy proceeding, for unpaid sales tax on the gross price of interstate bus tickets sold in Oklahoma. The State law, Okla. Stat. Title 68, § 1354(1)(C), requires Jefferson to collect and remit sales tax on the gross price of every bus ticket sold in Oklahoma.[1] The statute applies to the sale of all tickets sold in Oklahoma, regardless of where the trip begins or ends. Jefferson is a bus line providing transportation service for both intrastate and interstate travel. Jefferson objects to paying the sales tax for the miles travelled outside of Oklahoma, arguing that the sales tax violates the Commerce Clause of the United States Constitution, Article I, § 8, cl. 3.

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[1] The relevant part of Okla. Stat. Title 68, § 1354 (Supp. 1988), states:

> (1) There is hereby levied upon all sales, not otherwise exempted in Oklahoma Sales Tax Code, Section 1350 *et seq.* of this title, an excise tax of four percent (4%) of the gross receipts or gross proceeds of each sale of the following:
>
> * * *
>
> (C) Transportation for hire to persons by common carriers, including railroads both steam and electric, motor transportation companies, taxicab companies, pullman car companies, airlines, and other means of transportation for hire.



The Bankruptcy Court[2] agreed with Jefferson. The District Court[3] affirmed. So do we.

A state tax on interstate commercial activity violates the Commerce Clause unless it "is applied to an activity with a substantial nexus to the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services or benefits provided by the State." *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977). If a tax statute fails to meet any of these four standards, the statute will offend the Commerce Clause. See *Goldberg v. Sweet*, 488 U.S. 252 (1989). Both the District Court and the Bankruptcy Court held the statute was not fairly apportioned, thus failing the second standard of *Complete Auto*. We begin our inquiry by examining the issue of apportionment.

To determine whether a tax is fairly apportioned a court must ask whether the tax is both "internally" and "externally consistent." *Goldberg*, 488 U.S. at 261. The purpose of this inquiry "is to ensure that each State taxes only its fair share of an interstate transaction." *Goldberg*, 488 U.S. at 260-61.

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[2] The Honorable Dennis D. O'Brien, United States Bankruptcy Judge for the District of Minnesota.

[3] The Honorable Donald D. Alsop, Senior United States District Judge for the District of Minnesota.

For a tax to be internally consistent, it "must be structured so that if every State were to impose an identical tax, no multiple taxation would result." *Id.*, at 261. The purpose of this inquiry "is to ensure that each State taxes only its fair share of an interstate transaction." *Goldberg*, 488 U.S. at 260-61.

For a tax to be internally consistent, it "must be structured so that if every State were to impose an identical tax, no multiple taxation would result." *Id.*, at 261. The Oklahoma tax meets this test. As noted by the District Court and the Bankruptcy Court, an individual bus ticket can be sold in only one state. Therefore, even if every state taxed bus tickets sold within its borders, for all transportation originating within that state, no customer would be taxed more than once. Thus, the Oklahoma tax is internally consistent.

But is the Oklahoma tax externally consistent? "The external consistency test asks whether the State has taxed only that portion of the revenues from the interstate activity which reasonably reflects the in-state component of the activity being taxed." *Goldberg*, 488 U.S. at 262. When we evaluate the arguments, we must look beyond formalism and consider the practical and economic effect on the tax on interstate commerce. *Id.* at 264; see also *Central Greyhound Lines, Inc. v. Mealy*, 334 U.S. 653, 659-60 (1948).



The Commission contends that the tax is externally consistent and does not need to be apportioned because the tax is on the sale of the ticket and therefore is imposed only on local activity. To defend the assertion that only the sale of the ticket is taxed and not the use of the ticket, the Commission explains that the Oklahoma sales tax is based solely on the purchase price of the ticket, and that once the sale has occurred, the taxable event is complete. In essence, the Commission argues that the taxable activity is the sale of a ticket, not of transportation. This argument is too technical and flies in the face of how bus-ticket prices are set. A ticket price is set, at least partially, on the number of miles travelled. To say that only the purchase of a ticket is taxed, and not the use of the ticket, ignores the fact that the real value of the ticket is the right to ride a bus. The ticket without the travel would be of scant value to a customer. We will not separate the sale of a piece of paper from the service which is represents. To hold otherwise would elevate form over substance and require this Court to ignore economic realities.

Both courts below relied, correctly we think, on *Central Greyhound Lines, Inc. v. Mealy*, *supra*. In this 1948 case, New York levied a gross-receipts tax on a New York-based bus company. All of the company's revenues were subject to the tax, even though they included large sums attributable to transportation services performed in New Jersey. The Supreme Court held the tax invalid because it was not appor-

tioned as between intrastate and interstate transportation revenues. The Court said that "[b]y its very nature an unapportioned gross receipts tax makes interstate transportation bear more than 'a fair share of the cost of local government whose protection it enjoys.'" 334 U.S. at 663 (quoting *Freeman v. Hewit*, 329 U.S. 249, 253 (1946)). The vice of the New York gross-receipts tax was that "it [laid] 'a direct burden upon every transaction in [interstate] commerce by withholding, for the use of the State a part of every dollar received in such transactions.'" *Central Greyhound*, 334 U.S. at 663 (quoting *Crew Levick Co. v. Pennsylvania*, 245 U.S. 292, 297 (1917)) (citations omitted).

The same thing is true here. By levying a sales tax on the total price of tickets for interstate transportation, Oklahoma is attempting to tax the gross receipts from the sale of transportation outside its borders. It is taxing more than the instate component of the interstate activity. If a customer, for example, buys a ticket in Tulsa, Oklahoma, to travel from Tulsa to Nashville, Tennessee, most of the trip will occur outside of Oklahoma. Under the scheme urged by the Commission, Oklahoma receives tax revenues attributable to the entire trip, even though its bears none of the cost of repairing roads in Arkansas, nor does it provide any police or fire protection for miles travelled in Tennessee. Like the New York tax in issue in *Central Greyhound*, the Oklahoma sales tax is a direct burden on every transaction in interstate



commerce, and the amount of the burden bears no relationship to the portion of the trip that occurs within the taxing state.

The Commission suggests that *Central Greyhound* is distinguishable, because the tax there was a gross-receipts tax, formally levied upon the seller, whereas here a sales tax is involved, formally levied on the buyer, though collected by the seller and remitted to the State by it. The distinction is not significant enough to bear the weight that the Commission seeks to place upon it. Sales taxes and gross-receipts taxes have much in common. They are both measured by the gross receipts of the bus company, and are due whether the company makes a profit or not, and regardless of the cost to it of rendering the transportation service represented by the ticket sold. A gross-receipts tax is obviously an important part of the bus company's cost of doing business. The likelihood that it will be passed on to the customer, in whole or in part, is great, if the company expects to continue in business. Conversely, a sales tax, though in form levied upon the buyer of the ticket, has to be paid by the bus company whether it collects the tax from its customers or not. The bus company must remit the tax to the state whether or not it has added the tax to the price of the ticket as such. Okla. Stat. Title 68, § 1361(A) (Supp. 1988). In both situations, the amount of the tax varies directly with the amount of miles travelled, whether those miles are inside the taxing state or outside. This is a classic instance of

## APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

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| In re:<br><br>JEFFERSON LINES, INC.,<br>*Debtor.*<br>_______________<br><br>STATE OF OKLAHOMA, EX REL. OKLAHOMA TAX COMMISSION,<br>*Appellant,*<br><br>v.<br><br>JEFFERSON LINES,INC., and WESLEY B. HUISINGA, UNITED STATES TRUSTEE,<br>*Appellees.* | Civ No. 3-92-467<br><br>MEMORANDUM AND ORDER<br><br>[Filed Dec. 22, 1992] |

The State of Oklahoma appeals the bankruptcy court's[1] upholding of Jefferson Lines Inc.'s objection to the Oklahoma Tax Commission's claims for unpaid

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[1] The Honorable Dennis D. O'Brien, United States Bankruptcy Judge for the District of Minnesota.

sales taxes. For reversal, Oklahoma argues that the levy of this sales tax on the gross sale price of interstate bus tickets sold in Oklahoma does not violate the Commerce Clause of the United States Constitution. The Court affirms.

## I. BACKGROUND

The parties stipulate to the facts and to the legal issue in this case. Jefferson provides bus service in Oklahoma on both intra- and interstate routes. Jefferson filed for bankruptcy protection in the District of Minnesota in 1989. In response, the Commission filed several proofs of claims, all of which relate to tickets sold in Oklahoma for travel from Oklahoma to a destination in another state.

According to the Commission, Okla. Stat. tit. 68, § 1354(1)(C) (1991) required Jefferson to collect and remit a sales tax on the gross price of every bus ticket it sold in Oklahoma, regardless of what state the trip originated or terminated in. In remitting its taxes for the relevant periods, however, Jefferson deducted from its total sales the amount attributable to the sales of interstate tickets. When the Commission submitted its proofs of claims with respect to these amounts, Jefferson objected. The parties stipulated that the legal issue before the bankruptcy court was "Under the Oklahoma Statute 68 O.S. § 1354(C) may the State of Oklahoma assess and collect a sales tax on tickets sold in Oklahoma where the trip originates in Oklahoma and terminates in a state other than Oklahoma?" By an order dated May 13, 1992, the bankruptcy court sustained Jefferson's



objections, ruling that the tax imposed by § 1354(1)(C) violates the Commerce Clause, U.S. Const. art. I, § 8, cl. 3, because it is not fairly apportioned and because it discriminates against interstate commerce.

## II. DISCUSSION

Under 28 U.S.C. § 158(A) (1988), this Court has appellate jurisdiction over final judgments and orders of the United States Bankruptcy Court for the District of Minnesota. On appeal, this Court is to review de novo the bankruptcy court's conclusions of law. *In re Muncrief*, 900 F.2d 1220, 1224 (8th Cir. 1990).

A state tax on interstate commerce does not violate the Commerce Clause if it "[1] is applied to an activity with a substantial nexus with the taxing State, [2] is fairly apportioned, [3] does not discriminate against interstate commerce, and [4] is fairly related to the services provided by the state." *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977). As Oklahoma's tax must satisfy all four prongs of the *Complete Auto* test to survive a Commerce Clause challenge, *see Goldberg v. Sweet*, 488 U.S. 252 (1989), a finding that it fails one prong would obviate the need to apply the other prongs.

The Court turns first to the apportionment prong. "[T]he central purpose behind the apportionment requirement is to ensure that each state taxes only its fair share of an interstate transaction." *Id.* at 260-61. To determine whether a tax is fairly appor-

tioned, a court must examine whether it is internally and externally consistent. *Id.* at 261.

A tax is internally consistent if no multiple taxation would result were every state to impose an identical tax. *Id.* As a bus ticket can be sold in only one state, even if every state were to tax the sale of bus tickets within its borders, no purchasers would be taxed more than once. Therefore, Oklahoma's tax is internally consistent.

A tax is externally consistent if it is levied only on "that portion of the revenues from the interstate activity which reasonably reflects the in-state component of the activity being taxed." *Id.* at 262. Oklahoma's tax on the gross purchase price of intrastate bus tickets probably reasonably reflects the relative benefit Oklahoma confers on intrastate riders in the form of highway maintenance and other such services. However, by also taxing the entire purchase price of an interstate ticket, Oklahoma receives revenues that exceed the amount reasonably attributable to the Oklahoma leg of the bus journey. Thus, Oklahoma's tax does not appear to be fairly apportioned. *See Greyhound Lines, Inc. v. Mealy*, 334 U.S. 653, 662-63 (1948) (invalidating a state tax on the gross receipts of bus company when the tax was levied on the entire mileage of a bus trip although part of the trip was outside the state).

Nevertheless, Oklahoma argues that its tax is externally consistent, relying on *Goldberg*. The tax challenged in *Goldberg* was levied on the gross charge of interstate telecommunications originated or re-



ceived in Illinois and charged to an Illinois service address. *Goldberg*, 488 U.S. at 257. Illinois provided a credit to any taxpayer who was taxed by another state on a call taxed by Illinois. *Id.*

The *Goldberg* Court concluded that the Illinois tax was externally consistent because the risk of multiple taxation was slight and because apportioning a tax upon telecommunications was administratively virtually impossible. The Court concluded that the risk of multiple taxation was slight because states through which a telephone signal merely passes probably do not have a sufficient nexus to tax the call. *Id.* at 263. The *Goldberg* Court believed that only two states could have a nexus substantial enough to tax a particular interstate telephone call; a state that taxed interstate calls charged to a service address within the state, and a state that taxed interstate calls billed or paid within the state. *Id.* Thus, under the Illinois tax it was possible that a taxpayer with service and billing addresses in different states could be taxed twice on the same call. *Id.* This "limited possibility" of multiple taxation was not enough to invalidate the Illinois tax because Illinois provided for a credit in the event of multiple taxation. *Id.* at 264.

The *Goldberg* Court also found that apportioning the tax on a telephone call would "produce insurmountable administrative and technological barriers." *Id.* at 264-65. The Court noted that telephone networks offer billions of potential paths from one point to another, and that computers can switch calls rapidly and frequently from one path to

another without regard to state lines. *Id.* at 254-55. Thus, it is virtually impossible to trace and record the path of an individual call. *Id.* at 255. Accordingly, the Court held that the Illinois tax was fairly apportioned because the risk of multiple taxation was low, Illinois provided a credit in case of multiple taxation, and it is not administratively feasible to apportion taxes on telephone calls. *Id.* at 265.

Oklahoma argues that its tax is analogous to the tax in *Goldberg* under the external consistency test because Oklahoma is the only state with a sufficient nexus to tax the purchase of bus tickets. Oklahoma emphasizes that its tax is a sales tax upon the purchasers of bus tickets which "retailers" such as Jefferson collect and hold in trust for the state. Because its tax is only on the sale of tickets within the state, Oklahoma argues, no other state can impose such a tax on the same ticket. Thus, Oklahoma concludes, *Goldberg* controls and its tax, like Illinois' telecommunications tax, is externally consistent.

The *Goldberg* Court emphasized that the external consistency test "is essentially a practical inquiry." *Id.* at 264. Hence, Oklahoma describes its analysis as practical. However, Oklahoma's analysis exalts formalism over practical inquiry because it ignores a very real potential for double taxation. For example, Texas could tax Jefferson on the revenue it derived from the transportation of passengers within Texas. *See, e.g.*, *Greyhound Lines*, 334 U.S. at 662-63 (endorsing such a method of apportionment). If that were the case, a Jefferson passenger traveling from



Tulsa to Houston would effectively be taxed twice on the Texas portion of the journey. The fact that Oklahoma levies a sales tax on the ticket purchaser while Texas would levy its tax on Jefferson makes no practical difference, as Jefferson would pass the Texas tax on to the purchaser by increasing the price of the ticket. Thus, although Oklahoma may be the only state with a sufficient nexus to tax the *purchase* of a bus ticket in Oklahoma, other states still have a sufficient nexus to tax the very same activity that Oklahoma is taxing. Because the potential for multiple taxation is much higher in this case that in *Goldberg*, and because Oklahoma provides no credit in case of multiple taxation, Oklahoma's tax is quite unlike the telecommunications tax in *Goldberg*.

Oklahoma's tax also differs from the tax in *Goldberg* in that apportioning a tax on bus ticket purchasers poses no significant administrative burden. Although the *Goldberg* Court held that apportioning a tax on telecommunications was not feasible, it noted that in previous cases the Supreme Court has endorsed apportionment formulas based on the number of miles a bus, train, or truck travels with a taxing state. *Goldberg*, 488 U.S. at 264. These cases, it stated, all involved "the movement of large physical objects over identifiable routes, where it was practicable to keep track of the distance actually traveled within the taxing State." *Id.* Oklahoma does not argue, nor does the Court have reason to believe, that apportioning a tax on bus travel on the basis of the

number of miles traveled within the state is impracticable.

Therefore, the Court concludes that, under the standard enunciated in *Goldberg*, Okla. Stat. tit. 68, § 1354(1)(C) (1991) is not externally consistent when applied to bus tickets purchased in Oklahoma for travel to a destination in another state. Because the Oklahoma state thus fails the apportionment prong of the *Complete Auto* test, it violates the Commerce Clause. Accordingly, the order of the bankruptcy court is AFFIRMED.

DATED: December 22, 1992.

/s/ Donald D. Alsop
DONALD D. ALSOP,
Senior Judge
United States District Court



# APPENDIX C

## UNITED STATES BANKRUPTCY COURT
## DISTRICT OF MINNESOTA
## THIRD DIVISION

| | |
|---|---|
| In re: | Chapter 11 Case |
| Jefferson Lines, Inc., | BKY Case No. 3-89-4137 |
| Debtor. | ORDER |

This matter came before the Court on objection by Jefferson Lines, Inc. ("Debtor") to Claim Nos. 603-606 of the Oklahoma Tax Commission ("Commission") for unpaid sales tax in the consolidated amount of $46,655.15. Steven D. DeRuyter represents the Debtor. Douglas F. Price represents the Commission. The Court, having considered the briefs of the parties, and being fully advised in the matter, now makes this ORDER pursuant to the Federal and Local Rules of Bankruptcy Procedure.

I.

The facts are undisputed. Debtor, a Minnesota corporation, is a common carrier providing bus service

in Oklahoma and numerous other states. Debtor sells transportation tickets within Oklahoma for both intrastate and interstate routes. "Intrastate routes" are those which originate and terminate within the State of Oklahoma. "Interstate routes" are those which originate in Oklahoma and terminate in a state other than Oklahoma.[1] The Commission, under authority of Oklahoma law, applies a sales tax at a single specified rate to all intrastate tickets, and to all interstate tickets sold by a common carrier for transportation originating in Oklahoma.

Debtor filed for Chapter 11 relief on October 27, 1989. While operating under Sales Tax Permit No. 246600, Debtor deducted all interstate route tickets sold in Oklahoma in computing its total taxable sales. The Commission filed claims in the Debtor's estate seeking payment of the tax on interstate route tickets sold during September and October, 1989 and January and February, 1990. The total amount in controversy

[1] Additionally, Debtor has routes which originate outside of Oklahoma and terminate within Oklahoma, and routes which originate outside of Oklahoma, pass through Oklahoma, and terminate in a state other than Oklahoma. Although these are also interstate routes, Oklahoma does not tax interstate transactions regarding transportation that does not originate in Oklahoma. Accordingly, except where specifically referenced, the term "interstate routes" in this opinion means only those interstate routes for transportation originating in Oklahoma.



is $46,659.15.[2] Debtor objects to allowance of the claims on the grounds that applying Oklahoma's sales tax to the gross receipts of tickets sold in Oklahoma for its interstate routes violates the Commerce Clause of the United States Constitution.

II.

Does the Oklahoma sales tax statute which levies a tax on the gross receipts from sales of transportation over interstate routes violate the Commerce Clause of the United States Constitution?

III.

Oklahoma collects sales tax from the Debtor under the Oklahoma Sales Tax Code. 68 O.S. § 1354

[2] The Commission filed Proofs of Claim Nos. 603 and 604 on August 15, 1990, and 605 and 606 on August 16, 1990. The Commission asserts entitlement under these claims to treatment as a priority and administrative creditor for sales and withholding taxes. In its Omnibus Objection to Proofs of Claim, Debtor objects to these claims. On January 23, 1991, the Commission filed Amended Proofs of Claim Nos. 617 and 618, which amended Claim Nos. 603 and 604.

The parties agree that the Commission has reduced all amounts listed in Claim Nos. 603, 604, 605, 606, 617 and 618 by sales or withholding tax collected, other than the amount of sales tax due Oklahoma under Sales Tax Permit No. 246600.

(1)(C).[2] The Debtor argues that Oklahoma's imposition of a tax on the gross receipts of tickets sold in Oklahoma for interstate route transportation violates the Commerce Clause. U.S. Const., Art. I, § 8, cl. 3.[3]

Prior to 1977, the United States Supreme Court held that,

> [i]t was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing business.

*Western Live Stock v. Bureau of Revenue*, 303 U.S. 250, 254 (1938). Thus, state taxation of transactions involving interstate commerce was not necessarily

---

[2] 68 O.S. § 1354 (1)(C) reads in pertinent part:

(1) There is hereby levied upon all sales, not otherwise exempted in Oklahoma Sales Tax Code, Section 1350 et seq. of this title, an excise tax of four and one-half percent (4.5%) of the gross receipts or gross proceeds of each sale of the following:

(C) Transportation for hire to persons by common carriers, including railroads both steam and electric, motor transportation companies, taxicab companies, pullman car companies, airlines, and other means of transportation for hire.

[3] Art. I, § 8, cl. 3 reads in pertinent part:

The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.



regarded as a violation of the Commerce Clause. However, the Court also had ruled that any state tax levied for the expressed "privilege of doing business" in a state was a *per se* violation of the Commerce Clause. *See Spector Motor Service, Inc. v. O'Connor*, 340 U.S. 602 (1951). In 1977, the Court abandoned the *per se* analysis in *Spector Motor Service* in favor of a four-part test to determine whether a challenged state tax on interstate commercial transactions withstands constitutional scrutiny, regardless of its statutorily expressed purpose. *See Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977).

In *Complete Auto Transit*, the Court recognized prior decisions which held that such a tax does not violate the Commerce Clause if:

> the tax is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State.

*Id.* at 279.[5] *See also: American Trucking Assns. v. Scheiner*, 483 U.S. 266 (1987); *Goldberg v. Sweet*, 488 U.S. 252 (1989). Therefore, in order for the Oklahoma tax to survive a Commerce Clause challenge, its application must satisfy each part of the *Complete Auto Transit* test.

**A. The tax must be applied to an activity with a substantial nexus to the taxing State.**

The Debtor claims that the Oklahoma statute fails to meet the first part of the *Complete AUto Transit* test, arguing that the mere purchase of an interstate ticket in Oklahoma constitutes the only connection between the activity taxed and the taxing state. However, the Supreme Court has found that maintenance of two non-sales offices in California by a non-profit corporation created a sufficient nexus to justify a tax on sales made to California residents from the corporation's headquarters in Washington, D.C. *National Geographic Soc'y v. California Bd. of Equalization*, 430 U.S. 551 (1977). Debtor's contact with Oklahoma involves more than mere sales of interstate route tickets. It also sells intrastate tickets, pays sales tax on intrastate ticket sales, and

[5] The Court went on to affirm the Mississippi Supreme Court's judgment that a Mississippi tax on the "privilege of doing [interstate] business" was not a violation of the Commerce Clause,noting that the appellant relied only on the *Spector per se* rule, and did not object to the tax based on application of the four-part test. *See Complete Auto Transit*, 430 U.S. at 288.



maintains a presence in Oklahoma to facilitate both intrastate and interstate ticket sales. Additionally, Oklahoma issues the Debtor sales tax permits to facilitate collection and payment of sales tax. Although the Debtor views its nexus with Oklahoma as *de minimis*, it has a sufficient nexus to the taxing state under *National Geographic* to satisfy the first part of the *Complete Auto Transit* test.

**B. The tax must be fairly apportioned.**

In 1989, the *Goldberg* Court held "the central purpose behind the apportionment requirement is to ensure that each State taxes only its fair share of an interstate transaction." *Goldberg*, 488 U.S. at 260-261. *See: Container Corp. of America v. Franchise Tax Bd.*, 463 U.S. 159, 169 (1983). To determine whether the apportionment part of the *Complete Auto Transit* test is satisfied, the Court examines whether the tax is internally and externally consistent. *Goldberg*, 488 U.S. at 261. *American Trucking*, 483 U.S. at 284-285.

"To be internally consistent, a tax must be structured so that if every State were to impose an identical tax, no multiple taxation would result." *Goldberg*, 488 U.S. at 261. *See: Container Corp.*, 463 U.S. at 169. The Debtor suggests the Oklahoma tax lacks internal consistency because other states may enact laws that tax the interstate portion of the tickets sold in Oklahoma. However, the *Goldberg* Court declared the proper standard for the internal consistency test to be comparison with an *identical*

tax, not a similar tax. *Goldberg*, 488 U.S. at 261. Therefore, each state could enact an identical tax without producing multiple taxation if it were levied against interstate route tickets sold only within its own state for transportation originating there. Under the *Goldberg* standard, the Oklahoma sales tax is internally consistent.

The external consistency test is satisfied if the State taxes only that portion of revenues from the interstate activity which reasonably reflects the in-state component of the interstate activity being taxed. *Goldberg*, 488 U.S. 262. *See*: *Container Corp.*, 463 U.S. at 169. In making a practical inquiry, the Court noted:

> [i]n previous cases we have endorsed apportionment formulas based on the miles a bus, train, or truck traveled within the taxing State. But those cases all dealt with the movement of large physical objects over identifiable routes, where it was practicable to keep track of the distance actually traveled within the taxing State.

*Goldberg*, 488 U.S. at 264.[6] *See, e.g.*, *Central Greyhound Lines v. Mealey*, 334 U.S. 653 (1948) (buses); *American Trucking*, 483 U.S. 266 (1987) (trucks);

[6] The *Goldberg* Court held that apportioning by mileage the electronic impulses of a telephonic transmission would create "insurmountable administrative and technological barriers."



*Japan Line v. County of Los Angeles*, 441 U.S. 434 (1979) (cargo containers); *Complete Auto Transit*, 430 U.S. 274 (1977) (motor carriers); *Michigan-Wisconsin Pipe Line v. Calvert*, 347 U.S. 157 (1954) (oil pipelines). In *Central Greyhound*, a case with similar facts, New York taxed the gross receipts from ticket sales for interstate routes out of New York. The *Central Greyhound* Court held that the New York tax would withstand a Commerce Clause challenge if it were apportioned by mileage traveled within New York. *Central Greyhound*, 334 U.S. at 663-664. The Court found that:

> [b]y its very nature an unapportioned gross receipts tax makes interstate transportation bear more than 'a fair share of the cost of the local government whose protection it enjoys.'

*Central Greyhound*, 334 U.S. at 663, *quoting*, *Freeman v. Hewit*, 329 U.S. 249 (1947).

The Commission argues that the sales tax is self-apportioning since Oklahoma does not tax interstate tickets sold for routes which originate outside of Oklahoma and terminate within Oklahoma. However, in this Court's view, the *Central Greyhound* analysis is controlling. By taxing the gross receipts from interstate route tickets, the Commission has taxed more than the in-state component of the interstate activity. Accordingly, section 1354(1)(C) is not externally consistent. The tax is not fairly appor-

tioned, and therefore, it fails the second part of the *Complete Auto Transit* test.

**C. The tax must not discriminate against interstate commerce.**

The Debtor argues that the identical four and one-half percent (4.5%) tax on interstate and intrastate tickets clearly discriminates against interstate commerce. In past cases, the Supreme Court has decided that "a tax may violate the Commerce Clause if it is facially discriminatory, has a discriminatory intent or has the effect of unduly burdening interstate commerce". *Amerada Hess Corp. v. Director, Div. of Taxation, N.J. Dep't of the Treasury*, 490 U.S. 66, 75–79 (1989).

Section §1354(1)(C) is applied to all common carriers. Therefore, this statute allocates the tax burden in a facially neutral manner.

To determine if a tax has a discriminatory intent, the *Amerada* Court considered whether the tax was motivated by an intent to confer a benefit on local industry at the expense of interstate commerce. *See also: Bacchus Imports v. Dias*, 468 U.S. 263 (1984), in which a Hawaiian tax exemption for fruit wine was found to promote the local pineapple-wine industry. It does not appear from these facts that § 1354(1)(C) was enacted to promote or benefit Oklahoma common carriers at the expense of out-state common carriers.



In *American Trucking*, the Supreme Court invalidated the imposition of unapportioned lump-sum annual taxes on the operation of trucks and truck tractors as discriminating against interstate commerce. Accordingly, an unapportioned tax discriminates against interstate commerce, except (as in *Goldberg*) where lack of apportionment can be justified by administrative burdens. Therefore, in failing the apportionment part of the *Complete Auto Transit* test, the Oklahoma tax discriminates against interstate commerce. Section 1354(1)(C) fails the third part of the *Complete Auto Transit* test.

**D. The tax must be fairly related to the services provided by the State.**

The fourth part of the *Complete Auto Transit* test requires that the tax be fairly related to the activities of the Debtor in Oklahoma. *Goldberg*, 488 U.S. at 266. This part "focuses on the wide range of benefits provided to the taxpayer, not just the precise activity connected to the interstate activity at issue." *Id.* at 267. In *D. H. Holmes Co. v. McNamara*, 486 U.S. 24, the Supreme Court found that police and fire protection, mass transit service and public road maintenance provided by the State of Louisiana caused the tax to be related to the activities of Holmes in running retail stores and a mail order business in Louisiana. *Holmes*, 486 U.S. at 32. In this case, the Debtor receives police and fire protection, along with other public services, at the locations where it sells tickets and loads its buses. The Debtor also

receives benefit from police protection and public road maintenance on its Oklahoma routes. Therefore, the Oklahoma tax is fairly related to the business activities of the Debtor in Oklahoma.

IV.

Based on the foregoing, the Debtor is entitled to an order sustaining its objection on the grounds that the claim is for the payment of a tax on the gross receipts from the Debtor's sales of transportation over interstate routes which tax is levied in violation of the Commerce Clause of the Untied States Constitution.

Now, therefore, IT IS HEREBY ORDERED:

The objection of the Debtor to the claim of the Oklahoma Tax Commission is sustained.

Dated: 5/13/92

/s/ Dennis D. O'Brien
Dennis D. O'Brien
U.S. Bankruptcy Judge

No. 93-1677

In the
# Supreme Court of the United States
October Term, 1993

STATE OF OKLAHOMA, EX REL.
OKLAHOMA TAX COMMISSION,
*Petitioner,*

v.

JEFFERSON LINES, INC.,
*Respondent.*

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

**RESPONDENT JEFFERSON LINES, INC.'S**
**BRIEF IN OPPOSITION TO**
**PETITION FOR WRIT OF CERTIORARI**

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## QUESTION PRESENTED

Does the State of Oklahoma exact an unfair portion of the proceeds of interstate commerce by levying a tax on the gross purchase price of an interstate bus ticket regardless of the pro rata portion of travel which occurs in Oklahoma and even though Oklahoma bears no special relation or confers any proportionate benefit to such travel?

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In The
SUPREME COURT OF THE UNITED STATES
October Term, 1993

STATE OF OKLAHOMA, EX REL.
OKLAHOMA TAX COMMISSION, PETITIONER

*v.*

JEFFERSON LINES, INC., RESPONDENT

On Petition for Writ of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

RESPONDENT JEFFERSON LINES, INC.'S
BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

Respondent Jefferson Lines, Inc. respectfully prays that the petition for writ of certiorari be denied.

## OPINIONS BELOW

The opinions below are adequately set forth in the Petition for Writ of Certiorari ("Petition") and are appended to the Petitioner's Appendix.

## JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Commerce Clause of the United States Constitution, Article I, Section 8, Clause 3, provides:

The Congress shall have Power . . .

* * * *

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

Pertinent sections of the Oklahoma Sales Tax statutes are as follows:

OKLA. STAT. tit. 68, § 1354(1)(C) (Supp. 1988):

There is hereby levied upon all sales, not otherwise exempted in the Oklahoma Sales Tax Code, an excise tax of four percent (4%) of the gross receipts or gross proceeds of each sale of the following:

(C) Transportation for hire to persons by common carriers, including railroads both steam and electric, motor transportation companies, taxicab companies, pullman car companies, airlines, and other means of transportation for hire;



## STATEMENT OF CASE

Respondent Jefferson Lines, Inc. ("Jefferson")[1] was a common carrier providing bus services in Oklahoma as well as numerous other states. In its operation in Oklahoma, Jefferson sold both "intrastate" and "interstate" tickets. "Intrastate tickets" relate to routes which both originate and terminate solely within the State of Oklahoma. Conversely, "interstate tickets" sold in Oklahoma relate to: (1) routes which originate in Oklahoma and terminate in a state other than Oklahoma; (2) routes which originate and terminate in Oklahoma but involve travel outside of the State of Oklahoma (i.e., "roundtrip tickets"); and (3) routes which are purchased in the State of Oklahoma for travel that neither originates nor terminates in Oklahoma but necessarily cross at least one state line.

On October 27, 1989, Jefferson filed its Petition for Voluntary Chapter 11 Bankruptcy with the United States Bankruptcy Court District of Minnesota. On August 3, 1990, Jefferson's Plan of Reorganization was confirmed. In conjunction with Jefferson's Chapter 11 bankruptcy, the Commission filed various proofs of claim which alleged an obligation for the collection and remittance of certain sales tax in Oklahoma. The Commission claimed that Jefferson should have collected and remitted sales tax on the gross price of all bus tickets which merely originated in Oklahoma, even if the ultimate destination was outside Oklahoma or was for travel which would occur outside of Oklahoma. Jefferson objected to the Commission's proofs of claim.

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[1] There are no parent companies or subsidiaries which are required to be listed pursuant to Rule 29 of the Rules of the Supreme Court of the United States.

By Order dated May 13, 1992, the United States Bankruptcy Court, District of Minnesota, sustained Jefferson's objection holding that the tax is not fairly apportioned and discriminates against interstate commerce in violation of the mandates of the Commerce Clause of the United States Constitution. The Commission appealed. By Order dated December 22, 1992, the United States District Court, District of Minnesota, affirmed the Bankruptcy Court. The District Court reasoned that the tax establishes a strong potential for multiple taxation and is not reasonably apportioned. The Commission appealed. On January 21, 1994, the Eighth Circuit, in a decision authored by Chief Judge Richard S. Arnold, affirmed the District Court reasoning that Oklahoma was attempting to tax the gross receipts from the sale of transportation outside its borders by taxing more than the in-state component of the interstate activity in violation of the Commerce Clause of the United States Constitution. *See In re Jefferson Lines, Inc.*, 15 F.3d 90 (8th Cir. 1994).

## ARGUMENT

### I. Reasons for Denying the Petition for Writ of Certiorari

#### A. The Opinion of the Eighth Circuit is Based Upon Well-Settled Commerce Clause Analyses Developed by This Court Which Repeatedly Deny a State's Authority to Exact an Unfair Portion of Interstate Commerce

The Eighth Circuit correctly applied well-settled analysis to determine the issue of whether a state may levy a tax which is not fairly apportioned in violation of Article I, Section 8 of the Commerce Clause of the United States Constitution. As



correctly held by the Eighth Circuit, the tax in the present case imposes an unconstitutional direct unapportioned tax on interstate commerce.

The Eighth Circuit applied the test articulated by this Court in *Complete Auto Transit v. Brady*, 430 U.S. 274 (1977), to determine whether a state tax violates the Commerce Clause. *Jefferson Lines*, 15 F.3d at 91. As set forth in *Complete Auto*, a state tax which taxes interstate commerce can only be upheld as not violating the Commerce Clause if:

> the tax is [1] applied to an activity with a substantial nexus with the taxing state, [2] is fairly apportioned, [3] does not discriminate against interstate commerce, and [4] is fairly related to the services provided by the state.

*Complete Auto*, 430 U.S. 274 (1977). *Also see, American Trucking Associations, Inc. v. Scheiner*, 483 U.S. 266 (1978); *Goldberg v. Sweet*, 488 U.S. 252 (1989); *see generally, Central Greyhound Lines, Inc. v. Mealey*, 334 U.S. 653 (1948).

In order to survive a Commerce Clause challenge, a state statute which places a tax on interstate commerce must satisfy each prong of the four-prong test announced in *Complete Auto*. *Goldberg*, 488 U.S. at 260-268. The Eighth Circuit, as did the District Court, focused solely on the apportionment prong of the *Complete Auto* test where this tax so patently violates the Commerce Clause. As this Court has stated, the purpose of the apportionment prong is to prohibit taxes that pass an unfair share of the tax burden on to interstate commerce. *Quill v. North Dakota*, __ U.S. __, 112 S.Ct. 1904, 119 L.Ed. 2d 91 (1992).

### B. The Eighth Circuit Correctly Reasoned that Oklahoma's Levying of a Sales Tax on the Total Price of Tickets for Interstate Transportation is an Attempt to Tax the Gross Receipts of the Sale of Transportation Outside its Borders and thus Would Allow Oklahoma to Receive Tax Revenues Attributable to More Than the In-state Component of the Interstate Activity Being Taxed

The Commission contends that the Eighth Circuit opinion is in conflict with the applicable decisions of this Court and the Oklahoma Supreme Court. The Commission's contentions are based upon inconsistent reasoning which attempts to mischaracterize the taxable activity and ignores the practical and economic effect of the tax on interstate commerce. The Commission seeks Petition for Writ of Certiorari solely for this Court to review the conclusion by the Eighth Circuit that the tax, because it is not externally consistent, fails the apportionment prong of the *Complete Auto* test.

The Eighth Circuit correctly applied the reasoning from *Goldberg v. Sweet* in concluding that the tax is not externally consistent.

This Court in *Goldberg* reasoned that:

> The external consistency test asks whether the state has taxed only that portion of the revenues from the interstate activity which reasonably reflects the in-state component of the activity being taxed.

*Goldberg*, 488 U.S. at 262.



This, of course, is the fundamental problem with the tax and the Commission's application with regard to the collection and remittance of sales tax on interstate tickets. As stated by the Eighth Circuit, "a ticket price is set at least partially on the number of miles travelled." *Jefferson Lines*, 15 F.3d at 92. The Commission seeks to impose a gross receipts tax that cannot reasonably reflect the in-state component of the activity being taxed. Rather, because the tax at issue is levied on the entire gross receipt of the ticket, Oklahoma would receive tax revenue which logically and directly results from out-of-state activities (transportation occurring outside of Oklahoma's borders).

For example, an interstate ticket purchased in a town close to the Oklahoma border for a trip which proceeds immediately across the Oklahoma state line is taxed at the very same rate as an interstate ticket which is purchased in a town in the middle of Oklahoma or a "intrastate" ticket which solely uses Oklahoma roads. The amount of sales tax levied on an interstate ticket has absolutely no relationship with the "in-state component of the activity being taxed." *Goldberg*, 488 U.S. at 262. "The vice of such a tax is that it lays 'a direct burden upon every transaction in [interstate] commerce by withholding, for the use of the State, a part of every dollar received in such transactions.'" *Central Greyhound*, 334 U.S. at 663. Since Oklahoma taxes the entire gross price of the ticket regardless of the pro rata portion of the trip which occurs in the state, Oklahoma is attempting to directly burden every dollar of interstate commerce.

This Court has already addressed the constitutionality of a tax on interstate transportation. *See Central Greyhound Lines, Inc. v. Mealey*, 334 U.S. 653 (1948). This Court concluded that such a tax imposed an impermissible burden on

interstate commerce. *Id.* Even though *Central Greyhound* was decided prior to the present four-part analysis of *Complete Auto*, the principles and reasoning of *Central Greyhound* remain unchanged. As noted by the Eighth Circuit, the distinction between *Central Greyhound* and this case is not significant enough to bear the weight the Commission seeks to place upon it. *Jefferson Lines*, 15 F.3d at 93. Thus, because the Eighth Circuit's decision is not in conflict with applicable Supreme Court decisions, the Commission's petition does not raise special and important reasons for this Court to grant writ of certiorari.

Five courts have dealt with the identical issue of whether this tax is externally consistent. All five concluded that this is an unapportioned tax which violates the Commerce Clause of the United States Constitution.[3]

[3] *See, In re Jefferson Lines, Inc.*, BKY No. 3-89-4137, United States Bankruptcy Court, District of Minnesota (1992), Petitioner's Appendix C; *In re Jefferson Lines, Inc.*, Civil. No. 3-92-467, United States District Court, District of Minnesota (1992), Petitioner's Appendix B; *Oklahoma v. Jefferson Lines, Inc. (In re Jefferson Lines)*, 15 F.3rd 90 (8th Cir. 1994), Petitioner's Appendix A; *In re Eagle Bus Manufacturing, Inc.*, et al., Case No. 90-00985-B-11 to 90-00990-B-11, United States Bankruptcy Court, Southern District of Texas (1993), Respondent's Appendix A; *In re Eagle Bus Manufacturing, Inc. et al.*, Civil Action No. B-93-58, United States District Court, Southern District of Texas (1993), Respondent's Appendix B.



### C. The Eighth Circuit Opinion is not in Conflict with Applicable Decisions of this Court

Apparently, because of its differing result, the Commission asserts that the Eighth Circuit opinion conflicts with this Court's reasoning in *Goldberg*. However, the *Goldberg* holding was based upon a factually distinguishable tax. Thus, as will be demonstrated below, the Eighth Circuit opinion is completely consistent with this Court's reasoning in *Goldberg* and other relevant decisions of this Court.

In *Goldberg*, Illinois levied a telecommunications tax on the privilege of originating or receiving interstate telecommunications. *Goldberg*, 488 U.S. at 255-256. Unlike the Illinois tax in *Goldberg*, the Oklahoma taxing scheme has a high risk of multiple taxation. The high risk of multiple taxation results because other states could impose a tax upon the interstate activity and Oklahoma has not provided a credit provision to avoid such risk. *Id.* at 263. A high risk of multiple taxation is a factor for a court to consider in determining whether a state tax is externally consistent. *Goldberg*, 488 U.S. at 261-262.

In the present case, there is a substantial risk of multiple taxation on interstate bus tickets that is not present for intrastate bus tickets. If this Court were to adopt the Commission's Commerce Clause reasoning, there would be no prohibition against a state other than Oklahoma taxing: (1) the entire gross receipt of the same interstate ticket; or (2) that portion of the same interstate ticket whose miles are travelled within that state's borders, regardless of where the ticket originated. Thus, the Commission's assertion that there is absolutely no chance of multiple taxation or a discriminatory burden on interstate commerce is clearly false.

To see the probability of multiple taxation, one must only look at the effect of this present tax under the scenario of a state other than Oklahoma taxing the portion of the route which physically takes place in that state. Under this likely scenario, Jefferson would pay sales tax in Oklahoma on the entire gross receipts of the interstate ticket. In addition, Jefferson would pay sales tax in each of the other states through which its route travels on at least the number of miles traveled in that state. The result is multiple taxation for Jefferson as an interstate common carrier.

Multiple taxation is not a remote possibility. In these economic times, it is very likely that states other than Oklahoma in which Jefferson travelled would be in search of revenue producing taxes. Thus, it is not unlikely that another state may tax an interstate ticket purchased in Oklahoma, at the very least, on the portion of mileage travelled within that state. Even if no other state sought to tax its proportionate share of the revenue from this sale of an interstate ticket, such abstention would not justify the taxing by Oklahoma of the entire gross receipt of the ticket. *Central Greyhound*, 334 U.S. at 663. "By its very nature an unapportioned gross receipts tax makes interstate transportation bear more than a 'fair share of the cost of the local government whose protection it enjoys.'" *Id.*

The burden placed on interstate commerce by multiple taxation is readily apparent. The tax and the Commission's application may easily result in multiple taxation and, accordingly, does not meet the external consistency test. *Goldberg* at 261-262.

Moreover, the tax in *Goldberg*, due to administrative and technological barriers, was incapable of being apportioned. *Id.*



at 264-265. However, the tax in this case could be apportioned by the miles traveled within a particular state. *Jefferson Lines*, 15 F.3d at 93. This Court in numerous cases has approved apportionment formulas for taxes based upon miles traveled in a state especially when the tax dealt with the movement of large physical objects over identifiable routes. *See, e.g.*, *American Trucking Associations, Inc. v. Scheiner*, *supra* (trucks); *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434 (1979) (cargo containers); *Complete Auto*, *supra* (motor carriers); *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U.S. 157 (1954) (oil pipelines); and *Central Greyhound Lines, Inc. v. Mealey*, *supra* (buses); *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250 (1938) (tax on gross receipts of intrastate train travel is valid while a like tax on interstate train travel is not).

The Commission contends that the tax is externally consistent and does not need to be apportioned because the tax is on a sale of the ticket and therefore is imposed on local activity. The Commission argues that the taxable activity is the sale of a ticket, not of transportation. The Commission defends its contention by reasoning that only the sale of the ticket is taxed and not the use of the ticket. The Eighth Circuit correctly concluded that this argument is "too technical and flies in the face of how bus ticket prices are set." *Jefferson Lines*, 15 F.3d at 92. The Eighth Circuit recognized that the Commerce Clause analysis must look beyond formalism and consider the practical and economic effect of the tax on interstate commerce. *Id.; Goldberg*, 488 U.S. at 264; *see also Central Greyhound*, 334 U.S. at 659-60. In response to the Commission's contention, the Eighth Circuit reasoned:

> To say that only the purchase of a ticket is taxed, and not the use of the ticket, ignores the fact that

> the real value of the ticket is the right to ride a bus. The ticket without the travel would be of scant value to a customer. We will not separate the sale of a piece of paper from the service which it represents. To hold otherwise would elevate form over substance and require this Court to ignore economic realities.

*Jefferson Lines*, 15 F.3d at 92.

Likewise, the Commission's argument that the tax on interstate bus tickets is analogous to a tax on the sale of goods is illogical. The Commission would like this Court to believe that the purchase of an interstate bus ticket is a discreet event in which only the State of Oklahoma has an interest. However, the Commission's reasoning ignores the fundamental notion that the purchase of a good ends that good's participation in the stream of interstate commerce. On the other hand, the purchase of an interstate bus ticket, for all practical purposes, initiates that service's participation in the stream of interstate commerce. The purchase of an interstate bus ticket is not akin to the purchase of a good which is merely utilized or has travelled in interstate commerce. Oklahoma seeks to tax specific activities (travel) which physically occur outside the state. Thus, the Commission's reliance on *Wardair Canada, Inc. v. Florida Dept. of Revenue*, 477 U.S. 1 (1986), and *Itel Containers Int'l Corp. v. Huddleston*, 507 U.S. ___, 113 S.Ct. 1095, 122 L.Ed. 2d 421 (1993), which uphold a state sales tax on a good, is misplaced. Moreover, this Court did not analyze the taxes in *Wardair* or *Itel* under the *Complete Auto* test. *Wardair*, 477 U.S. at 8; *Itel*, 507 U.S. at __, 113 S.Ct. 1095, 122 L.Ed. 2d at 436.



The Commission further relies on *McGoldrick v. Berwind-White Coal Mining Company*, 309 U.S. 33 (1939), to demonstrate that the transaction at issue here is not conducted in interstate commerce and that the Eighth Circuit's decision in this case is inconsistent with the holding in *McGoldrick*. The reliance on an alleged conflict with this Court's decision in *McGoldrick* is unwarranted. In a strained effort to analogize *McGoldrick*, the Commission attempts to characterize the sale of an interstate bus ticket as a purely local event not effecting interstate commerce. Such a position is unrealistic.

The term "interstate commerce" means "commerce between any place in a State and any place in another State, or between places in the same State through another State...." *Central Greyhound*, 334 U.S. at 661. It is undisputable that the tax upon which the Commission's claims are premised, is a direct tax on interstate commerce. In the present case, nothing is gained by not recognizing the fact that it is interstate commerce which the State of Oklahoma is seeking to reach. *Id.* However, the Commission seeks to "indulge in pure fiction" by taxing the gross proceeds of an interstate ticket and then ignoring the benefits conferred by the other states through which Jefferson must travel. *Central Greyhound*, 334 U.S. at 660.

In *McGoldrick*, New York City levied a tax on the sale of goods within the city. This Court in *McGoldrick* determined that the taxable event at issue was "the transfer of possession to the purchaser within the state" regardless of the time and place of passing title. *Id.* at 49. The *McGoldrick* case only stands for the position that a state may tax a good which has travelled in interstate commerce but is sold locally. *Id. See also Liberty Steel Co. v. Oklahoma Tax Commission*, 554 P.2d 8, 11 (Okla. 1976). The "good", in this case, is interstate

travel. The ticket is merely a receipt. The purchase of interstate travel is not a purely local event and thus, Oklahoma may only tax that portion of revenue which reasonably reflects the in-state portion of the activity being taxed. *Goldberg*, 488 U.S. at 262. Thus, because the Commission is directly taxing interstate commerce and not a good which has merely travelled in interstate commerce (coal), the reasoning from *McGoldrick* is not applicable.

As an apparent last resort, the Commission contends that merely because the Oklahoma sales tax is a "garden variety" sales tax, this Court need not scrutinize the tax utilizing the four-prong *Complete Auto* test. The Commission's assertion attempts to pervert the very protection from over-reaching state taxes that the Commerce Clause promotes. It is insufficient to assert in response to a lack of apportionment finding by five courts that the tax in question is in the nature of a sales tax. The very reason the tax is being challenged is because it applies to an interstate activity. Thus, regardless of the nature of the tax, a state is prohibited by the Commerce Clause from imposing a disproportionate and discriminatory burden on interstate commerce. *Id.* at 270; *see also Quill*, __ U.S. __, 112 S.Ct. 1904, 119 L.Ed. 2d 91 (1992). The Eighth Circuit's opinion is completely consistent with the decisions of this Court and the Oklahoma Supreme Court regarding whether a state tax violates the Commerce Clause of the United States Constitution.



## CONCLUSION

None of the considerations governing review of certiorari enumerated in paragraph 1(a) of Rule 10 are present in this case. The Petition is wholly without merit and should be denied.

Respectfully submitted,

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## APPENDIX A

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

| | | |
|---|---|---|
| IN RE: | ) | |
| | ) | |
| EAGLE BUS MANU- | ) | Case No. 90-00985-B-11 |
| FACTURING, INC., | ) | TO 90-00990-B-11 |
| GREYHOUND LINES, | ) | |
| INC., TRAILWAY | ) | JOINTLY |
| COMMUTER TRANSIT, | ) | ADMINISTERED |
| INC., BUSLEASE, | ) | Case No. 90-00985-B-11 |
| INC., GLI BUS | ) | and |
| OPERATIONS | ) | Case Nos. 90-01984-B- |
| HOLDING COMPANY, | ) | 11 |
| GLI FOOD SERVICES, | ) | TO 90-01989-B-11 |
| INC., SOUTHERN | ) | (Chapter 11) |
| GREYHOUND LINES, | ) | |
| CO., GLI HOLDING | ) | JOINTLY |
| COMPANY, CENTRAL | ) | ADMINISTERED |
| GREYHOUND LINES | ) | Case Nos. 90-00985-B11 |
| CO., EASTERN | ) | (Chapter 11) |
| GREYHOUND LINES | ) | |
| CO., and WESTERN | ) | |
| GREYHOUND LINES CO. | ) | [Entered Feb 5, 1993] |
| Debtors. | ) | |

**FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING THE TAX CLAIM OF THE OKLAHOMA TAX COMMISSION**

This matter came before the Court on the Objection of Greyhound Lines, Inc. ("Greyhound") to Claim No. 17,841 filed by the Oklahoma Tax Commission (the "Commission") for recovery of unpaid sales tax in the amount of $906,866.59 (the "Commission's Claim"). John B. Turner and Rebecca M. Fowler represent Greyhound. Douglas F. Price represents the Commission. The Court, having heard oral arguments on September 28, 1992, and having considered the briefs of the parties, and being fully advised in the matter, now makes the following findings of fact and conclusions of law in support of the Order Disallowing the Tax Claim of the Oklahoma Tax Commission:

**I.**

This Court finds that it has jurisdiction pursuant to 28 U.S.C. § 157(a) and 1334(b), and the Order entered on November 11, 1991, confirming the Third Amended Plan of Reorganization under Chapter 11 of the United States Bankruptcy Code for Greyhound Lines, Inc. and Its Affiliated Debtors and that this is a core proceeding under 28 U.S.C. § 157(b)(2)(B).

**II.**

This matter was submitted to the Court on stipulated facts. Greyhound, a Delaware corporation, is a common carrier providing transportation by bus in Oklahoma and many other states. The transportation provided by Greyhound is interstate commerce. Greyhound provides transportation on interstate and intrastate routes. An interstate route is a route which originates in one state and crosses over into another state. An intrastate route is a route solely within a single state.



Greyhound sells tickets in Oklahoma for transportation on the following types of routes:

a. an intrastate route wholly within the State of Oklahoma;

b. an intrastate route wholly within a state other than Oklahoma;

c. an interstate route which commences in Oklahoma and terminates in another state;

d. an interstate route which commences and terminates in Oklahoma, but passes through another state; and

e. an interstate route wholly outside the State of Oklahoma.

The Commission, under authority of Oklahoma law, applies a sales tax at a single specified rate to all tickets for transportation sold in Oklahoma. Greyhound, operating under Oklahoma Sales Tax Permit No. 458229, remits, to the state, sales tax on all tickets sold for transportation on an intrastate route wholly within the State of Oklahoma.

Greyhound filed a voluntary petition seeking relief under Chapter 11 of the Bankruptcy Code on June 4, 1990. The Commission subsequently filed claims in Greyhound's case seeking payment of tax on all tickets sold by Greyhound in Oklahoma during the period June 1, 1987 to May 31, 1990, except those sales for which Greyhound had previously remitted tax, and those sales to governmental entities and

churches which the Commission had determined to be exempt from tax. The total amount in controversy is $906,866.59.

Greyhound objects to the allowance of the claims on the basis that application of Oklahoma's sales tax to the gross receipts from tickets sold in Oklahoma for transportation on routes other than intrastate routes within Oklahoma violates the Commerce Clause of the Constitution.

## III.

The issue before the Court is whether the Oklahoma sales tax statute, which levies a tax on the gross receipts from sales of tickets for transportation by bus, violates the Commerce Clause of the United States Constitution.

## IV.

Oklahoma collects sales tax from Greyhound pursuant to the Oklahoma Sales Tax Code. 68 O.S. § 1354(1)(C)[1]. Greyhound argues that imposition of the tax on gross receipts from sales of tickets for any transportation other than on an intrastate route wholly within the State of Oklahoma violates the Commerce Clause of the Constitution.

The United States Constitution expressly authorizes Congress to "regulate commerce with foreign Nations, and

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1. The statute reads in pertinent part: Transportation for hire to persons by common carriers, including railroads, both steam and electric, motor transportation companies, taxicab companies, pullman car companies, airlines, and other means of transportation for hire.



among the several States." U.S. Const. Art. I, § 8, cl. 3. This clause has consistently been interpreted to prohibit actions by the states which interfere with interstate commerce. See, e.g., South Carolina State Highway Dept. v. Barnwell Bros., Inc., 303 U.S. 177, 185 (1938). The clause, however, may not be used to "relieve those engaged in interstate commerce from their just share of state tax." Western Live Stock v. Bureau of Revenue, 303 U.S. 250, 254 (1938).

In order to survive constitutional scrutiny, a state tax on interstate commerce, such as the transportation provided by Greyhound, must reflect an appropriate balance between freedom from interference and responsibility for paying a fair share. The Supreme Court identified that balance in Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977).

Deciding that it was the practical effect of a state tax which determines it constitutionality, the Complete Auto Court articulated a four-prong test with which to evaluate the effect of a tax. A state tax will be found to be constitutional only if: (1) the tax is applied to an activity with a substantial nexus with the taxing state; (2) the tax is fairly apportioned; (3) the tax does not discriminate against interstate commerce; and (4) the tax is fairly related to the services provided by the taxing state. Id. at 279.

In order to withstand constitutional scrutiny, a state must satisfy each prong of the test. The Oklahoma tax at issue here cannot withstand this test.

### A. **Nexus**

The first prong of the Complete Auto test determines whether the activity subject to the tax has a substantial nexus

with the taxing state. To satisfy this prong of the test there must be a relationship between the activity taxed and the state, and that relationship must be substantial. Quill Corp. v. North Dakota, 119 L.Ed. 2d 91, 107 (1992).

The activity at issue here is transportation on all routes except those wholly within the state of Oklahoma. The Commission, relying on National Geographic Society v. California Bd. of Equalization, argues that the mere sale of the ticket within the state satisfies the requirement that there be a substantial nexus between transportation and the state. 430 U.S. 551 (1977). The National Geographic Court, however, addressed the situation where a California resident received goods in California from an organization which maintained offices in California. The facts in this case, however, differ from those in National Geographic.

Here, Greyhound acknowledges that it maintains offices within the State of Oklahoma. There is, however, no evidence that the transportation at issue is purchased by a resident of Oklahoma. More importantly, the evidence clearly demonstrates that in all instances a portion of the transportation purchased is not received within Oklahoma. Furthermore, in some instances, none of the services received within the state. The conclusion reached in National Geographic, therefore, does not apply here.

The Commission has failed to demonstrate here that there is more than a de minimis connection between the activity at issue and the state. The tax thus fails to satisfy the first prong of the Complete Auto text.



**B. Apportionment**

The second prong of the Complete Auto test requires that a state tax on an interstate activity be fairly apportioned. 430 U.S. at 279. This requirement ensures that each state taxes only its fair share of an interstate transaction. Goldberg v. Sweet, 488 U.S. 252, 263 (1989). Because there is no single apportionment formula, the taxing statute must be analyzed to determine if it is internally and externally consistent. Western Live Stock v. Bureau of Revenue, 303 U.S. 250, 161 (1938).

**1. Internal Consistency.**

"To be internally consistent, a tax must be structured so that if every State were to impose an identical tax, no multiple taxation would result. Thus, the internal consistency test focuses on the text of the challenged statute." Goldberg, 488 U.S. at 263.

The statute at issue here imposes a tax on the gross receipts of each sale of "transportation for hire to persons by common carrier, including . . . motor transportation companies." 68 O.S. § 1354(1)(C). Because the statute fails to identify the point of sale, it allows Oklahoma to tax transportation sold in Oklahoma which occurs partially or completely within another state. The statute also allows Oklahoma to tax transportation sold in other states which occurs within Oklahoma. The text of the statute thus allows Oklahoma to tax the transaction if the receipt of either the ticket or the transportation occurs in Oklahoma.

The transportation at issue here occurs, at least partially, in a state other than Oklahoma. If those states in which transportation occurs had a statute identical to Oklahoma's,

those states would be able to tax the transportation which occurred within their boundaries. For example, if one of the tickets sold in Oklahoma was for travel between Dallas and Houston, Oklahoma would tax the transaction because the ticket sold in Oklahoma, and Texas, if it had an identical statute, could tax the transaction because the transportation occurred in Texas.

The Supreme Court has noted with emphasis that only a tax scheme which allows credits for taxes collected by other states on the same transactions can survive the test of constitutionality. Goldberg, 488 U.S. 256. Oklahoma has no such provision for tax credits. Because the practical possibility of multiple taxation exists here, Oklahoma's taxing statute, therefore, is not internally consistent.

### 2. External Consistency.

To be externally consistent, the tax must apply only to that portion of the revenue from interstate activity which reasonably reflects the in-state component of that activity. Id. at 262. A state tax may thus be applied only to those activities which occur within its borders. Complete Auto, 430 U.S. at 282.

The Oklahoma tax on this interstate activity does not reflect only the in-state component of those activities. Here, Oklahoma attempts to tax a specific interstate activity which physically occurs outside the state. The tax, therefore, is not externally consistent.

The Commission argues that by taxing transportation occurring outside Oklahoma for which tickets are sold in Oklahoma and not taxing transportation which occurs in



Oklahoma for which tickets are sold elsewhere, the state recovers an amount equivalent to what it would recover if it taxes all transportation within the state. The Commission thus argues that the tax is self apportioning.

The Commission cited no authority for this novel theory, and there appears to be none. Moreover, even if there were support in the existing law, the Commission is unable to demonstrate that the proceeds of the tax do, in fact, reflect the transportation provided by Greyhound within the state of Oklahoma. The Commission offers no factual basis for its assumptions and such unfounded assumptions are not sufficient to satisfy the Complete Auto external consistency test.

The Oklahoma statute imposes a tax on activities which physically occur outside its borders. The statute, therefore, clearly fails to satisfy the external consistency prong of the Complete Auto test.

### C. Discrimination Against Interstate Commerce

The third prong of the Complete Auto test requires the taxing authority to demonstrate that the tax does not discriminate against interstate commerce. Such discrimination can be reflected on the face of the statute, the intent of the statute, or the practical effect of the statute. Amerada Hess Corp. v. Director, Div. of Taxation, N.J. Department of the Treasury, 490 U.S. 66, 75-79 (1989). Here, discrimination against interstate commerce is reflected in the practical effect of the statute.

The tax at issue here is applied to the gross receipts from the sale of a ticket including tickets reflecting travel on an interstate route passing through Oklahoma. An interstate

traveler on one of these routes traveling the same number of miles within the state on an intrastate route will thus pay a greater amount of tax. The tax, therefore, imposes a disproportionate burden on interstate travel. See American Trucking Association, Inc. v. Scheiner, 483 U.S. 266 (1987). Because the tax is discriminatory, it fails to pass the third prong of the Complete Auto test.

**D. Relation to State Services**

The fourth prong of the Complete Auto test analyzes whether the tax imposed is fairly related to the presence and activities of the taxpayer within the state. "The purpose of this test is to ensure that a State's tax burden is not placed upon persons who do not benefit from services provided by the State." Commonwealth Edison v. Montana, 453 U.S. 609 (1981).

Here, the taxpayers are the bus passengers. There is no dispute that the in-state activities of those passengers benefit from the services provided by the State of Oklahoma, which are funded at least in part by the tax at issue. The passengers whose transportation is at issue here, however, are taxed on out-of-state activities as well as in-state activities, and some passengers are taxed on their out of state activities when they have no in-state activity at all.

The out-of-state activities of Greyhound's passengers, which are taxed at the same rate as in-state activities, receive no benefits from the state of Oklahoma. Those out-of-state activities are benefited instead by the services provided by the other states in which those activities are conducted. There is thus no relation between the tax on transportation which occurs outside the state and services provided by the state within



Oklahoma. The tax at issue here, therefore, fails the fourth prongs of the Complete Auto test.

**V.**

The tax at issue here is unable to satisfy all four prongs of the Complete Auto test. Greyhound, therefore, is entitled to an order sustaining its objection to the Commission's Claim. The Commission's Claim is disallowed because it reflects a tax on the gross receipts from Greyhound's sales of transportation over routes outside the state and is thus levied in violation of the Commerce Clause of the United States Constitution. A separate order based on the foregoing findings of fact and conclusions of law shall be entered.

Date: FEB 3 1993

/s/ Richard S. Schmidt
Richard S. Schmidt
United States Bankruptcy Judge

## APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

| | | |
|---|---|---|
| IN RE: | § | |
| | § | |
| EAGLE BUS MANUFACTURING, | § | |
| INC., ET AL, | § | Civil Action |
| Debtor, | § | No. B-93-58 |
| | § | |
| STATE OF OKLAHOMA, ex rel. | § | |
| OKLAHOMA TAX COMMISSION | § | |
| Appellant, | § | [Filed |
| | § | Oct. 4, 1993] |
| VS. | § | |
| | § | |
| GREYHOUND LINES, INC., | § | |
| Appellee. | § | |

### OPINION

The aforementioned cause number represents an appeal from an order entered by the Bankruptcy Court for the Southern District of Texas, Brownsville Division denying claim number 17841 in Greyhound Lines, Inc. voluntary Chapter 11 petition jointly administered as Bankruptcy No. 90-00985-B-11.

### STATEMENT OF THE CASE

Greyhound is a common bus carrier providing transportation in Oklahoma as well as other states. Greyhound



sells transportation in Oklahoma for the following types of routes:

a. intrastate routes wholly within the State of Oklahoma.
b. intrastate routes wholly within states other than Oklahoma.
c. interstate routes originating in Oklahoma but terminating in another state.
d. interstate routes originating in Oklahoma and terminating in Oklahoma, but passing through another state.
e. interstate routes wholly outside the state of Oklahoma.

Greyhound Lines, Inc. filed for voluntary relief under Chapter 11 of the Bankruptcy Code on June 4, 1990. In response to this the Appellant, Oklahoma Tax Commission, conducted an audit of Greyhound's books and records, which was completed in November of 1990. The Commission applies a sales tax at a single rate to all tickets for transportation sold in Oklahoma. The audit revealed that Greyhound did not collect state sales taxes from consumers who purchased tickets which involved travel outside the state of Oklahoma.[1]

[1] The statute at issue here provides in relevant part:

> There is hereby levied upon all sales, not otherwise exempted in the Oklahoma Sales Tax code, section 1350 et seq. of this title, an excise tax of four and one-half percent (4.5%) of the gross receipts or gross proceeds of each sale of the following........(emphasis added).

Operating under tax permit no. 458229 Greyhound, however, did remit sales tax on all tickets sold for transportation on an intrastate route wholly within the state of Oklahoma.[2]

Accordingly, the Commission filed claim no. 17841 for $908,212.89 representing the amount allegedly owed by Greyhound for transportation sold that did not involve entirely intrastate routes.[3] Greyhound filed an objection to this claim on April 10, 1992 asserting that the alleged tax liability claimed by the Commission was an improper tax on interstate commerce and therefore violative of the Commerce Clause of the United States Constitution. Following oral argument on the issue, the parties filed stipulations of fact and briefs for consideration by the Bankruptcy Court. United States Bankruptcy Judge Richard S. Schmidt applied the four-prong

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> (c) The transportation for hire to persons by common carriers, including railroads both steam and electric, motor transportation companies, airlines, and other means of transportation for hire;

Okla. Stat. tit. 68, § 1354(1)(C)(1981 and Supp. 1990).

[2] There was no dispute and therefore no claim filed concerning these taxes.

[3] This amount reflects the four and one-half percent tax on gross receipts of all tickets sold by Greyhound in Oklahoma from June 1, 1987 to May 31, 1993, except those taxes previously remitted, and those sales to governmental entities and churches which are deemed exempt by the commission, plus penalties and interest.



test enumerated in Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 97 S.Ct. 1076, (1977) and concluded that Oklahoma's sales tax, as applied, failed all four prongs, and accordingly sustained Greyhound's objection. It is from this determination that the Appellant appeals.

Therefore the issue on appeal is does Okla. Stat. tit. 68, § 1354(1)(C)(1981 and Supp. 1990), which levies a tax on the gross receipts from sales of transportation for hire, including interstate routes, violate the Commerce Clause of the United States Constitution, and as a consequence did the Bankruptcy court properly sustain Greyhound's objection to claim no. 17841.

## CONCLUSIONS OF LAW

This appeal is properly before the Court pursuant to 28 U.S.C. § 158 and Bankruptcy Rule 8002. The issues in this case were presented to the Bankruptcy Court by stipulation and involved only questions of law. Therefore the standard of review in this case is De Novo. Matter of Multiponics, Inc., 662 F.2d 709 (5th Cir. 1980).

In what is commonly referred to as the Commerce Clause, the United States Constitution provides: "Congress shall have the power to regulate commerce, with foreign nations, and among the several states, and with the indian tribes." *U.S. Const. Art. 1§ 8, cl 2.* This grant of power has negative implications on a state's power to tax, and thereby regulates certain transactions involving interstate commerce. In fact, the Commerce Clause has been interpreted to prohibit actions by the states that interfere with interstate commerce. See, Quill Corp. v. North Dakota, 119 L. Ed 91 (1992); South Carolina State Highway Dept. v. Barnwell, 303 U.S. 177, 185 (1983).

Notwithstanding, the Commerce Clause may not be used to exempt persons engaged in interstate commerce from their fair share of state tax. Western Live Stock v. Bureau of Revenue, 303 U.S. 250, 254 (1938).

State taxes relating to interstate commerce must reflect a balance between paying a just share of taxes and freedom from interference. In Complete Auto Transit, Inc. the Supreme Court pronounced this balance and set forth a four prong test for determining whether or not a state tax violates the Commerce Clause. A state tax will survive constitutional analysis if:

(1) the tax is applied to an activity with a substantial nexus to the taxing state;
(2) the tax is fairly apportioned;
(3) the tax does not discriminate against interstate commerce; and
(4) the tax is fairly related to the services provided by the taxing state.

Further, in order to pass muster the tax must survive all four of the prongs. Id.

Nexus to the Taxing State

The first prong inquires whether the activity subject to the tax has a substantial nexus or relationship to the taxing state. Id.; Quill Corp. v. North Dakota, 119 L.Ed. 2d 91, 107 (1992)(Holding the relationship between the taxing state and the activity must be substantial). Specifically, the activity to be taxed in this case is transportation provided by Greyhound on all routes except those wholly within the state of Oklahoma.



Appellant cites National Geographic Society v. California Bd. of Equalization, for the proposition that the mere sale of the ticket within the state satisfies the requirement of a nexus between the transportation and the state. 430 U.S. 551 (1977). This Court does not agree. National Geographic involved goods purchased by residents of the state of California and received wholly in California, from an organization that maintained offices in California. The court in National Geographic determined that the goods were subject to the sales tax. The case at hand differs significantly.

Greyhound does maintain offices in Oklahoma, however this is where the similarity to National Geographic ends. There is nothing to show that the transportation at issue here is always purchased by a resident of Oklahoma or that it is always received in Oklahoma. The evidence does, however, demonstrate that the tax on gross receipts taxes a portion of transportation paid for in Oklahoma, but not received in Oklahoma. For example, a ticket purchased in Oklahoma for transportation from Tulsa to Dallas, Texas would be subject to the entire tax, even that portion occurring in Texas. There would be no nexus to Oklahoma for the transportation received in Texas. In fact, as applied, the Oklahoma tax could conceivably tax transportation that does not occur in Oklahoma at all. A ticket purchased in Oklahoma for transportation between Austin, Texas and Dallas, Texas would be subject to the sales tax, yet there is no significant nexus between the transportation and the taxing state. The transportation does not even occur in the state.

In order to follow the Appellant's rational the Court is asked to envision that the good purchased is the ticket, rather than the transportation. The Court is unable to close its eyes to the fact that the good purchased is the transportation, as the

ticket is merely a receipt. The Court does not agree that the purchase of a ticket completes the transaction.

Additionally, the Supreme Court has mandated that the mere origination or termination of interstate activity in a particular state is insufficient to establish a substantial nexus to the taxing state. Goldberg v. Sweet, 488 U.S. 252, 263 (1989)(Concerning the termination of interstate communications). As applied, the activity in this case, transportation on all routes except those wholly within the state of Oklahoma, has nothing more than a minimal connection to the taxing state. Therefore the tax fails the first prong of Complete Auto. This analysis alone would be sufficient for the Bankruptcy Court to find that the tax, as applied to Greyhound, was violative of the Commerce Clause. Nevertheless, the Court will consider the remaining factors.

Apportionment

The second prong of the Complete Auto test requires the Court to consider whether the tax is fairly apportioned. In other words, to consider whether the state is taxing only its fair share of an interstate activity, as opposed to taxing the entire interstate activity. Goldberg, 488 U.S. at 260-261.

While the Supreme Court does not mandate a specific apportionment formula, customarily they have detennined transportation tax on interstate commerce to be fairly apportioned when it is based on a physical relationship ratio. Interstate activity such as surface transportation over an interstate route is deemed to be fairly apportioned when it is applied only to the activity that is occurring within its borders. See Central Greyhound Lines, Inc. v. Mealey, 334 U.S. 653, 663 (1947); Western Live Stock v. Bureau of Revenue, 303



U.S. 250, 257 (1938); Pan American Airways Inc. v. Government of Virgin Islands, 315 F. Supp. 746, affirmed, 459 F.2d 387 (3rd Cir. 1972) (Recognizing that tax on unapportioned gross sales receipts on transportation can burden interstate commerce, but carving an exception for air travel in that it does not have physical contact with the other state as it passes through its airspace).

The Supreme Court in Central Greyhound was faced with an almost identical issue. The New York Tax Commission was attempting to tax gross sales receipts from Greyhound's transportation sales in New York, which included transportation that occurred in the neighboring states. The Court determined that the entire tax need not fail, but that it must be fairly apportioned to coincide with that portion of the mileage that occurred within the state. Notwithstanding, a specific apportionment method has never been mandated by the Supreme Court, and therefore courts must analyze the tax to determine if it is internally and externally consistent. Complete Auto, 488 U.S. at 261.

To be internally consistent the tax must be structured such that if every state imposed an identical statute, no multiple taxation would occur. Id. The statute involved in this case imposes a tax on the gross receipts of each sale of transportation for hire to persons by common carrier, but does not identify a point of sale with respect to transportation.[4] The result is a tax that could encompass transportation sold in

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[4] The Appellant does identify a point of sale definition in its tax code, however it does not appear to apply to Okla. Stat. tit. 68, § 1354(1)(C)(1981 and Supp. 1990).

Oklahoma, but that may not occur in Oklahoma or that may tax transportation sold in other states but that does occur in Oklahoma. In other words, due to the language of the statute, it may allow a tax on the transaction if the receipt of either the ticket or the transportation occurs in Oklahoma.

The activity here, transportation provided by Greyhound on all routes except those wholly within the state of Oklahoma, occurs at least partially in another state. If those states in which the transportation occurred had an identical statute to the one in this case, they would be able to tax the transportation which occurred within their boundaries, thereby causing multiple taxation. For example, assume that one of the tickets sold in Oklahoma was for transportation between Austin and Dallas, and Texas had a statute identical to Oklahoma, one that could conceivably tax both the ticket or the transportation. In that scenario both Texas and Oklahoma could tax the single transaction thereby preventing the tax from being internally consistent. The Supreme Court has noted that only a tax which allows credits for taxes collected by other states on the same transaction can survive this test for constitutionality. Goldberg, 488 U.S. 265.

To be externally consistent, the tax must apply only to that portion of the revenue from interstate activity which reasonably reflects the in-state component of that activity. Id. The Claim in this case was for taxes that reflected out of state activities, and therefore the tax is not externally consistent. The Court does not agree with the Appellant that the taxes in this case are self apportioning because the state does not collect taxes on transportation that occurs in Oklahoma, but is ticketed elsewhere. The Statute therefore clearly fails the second prong of the Complete Auto test.



Discrimination Against Interstate Commerce

The third prong of the test requires the taxing authority to show that the tax does not discriminate against interstate commerce. If the discrimination is reflected on the face of the statute, the intent of the statute, or the practical effect of the statute, then the tax discriminates against interstate commerce and is violative of the Commerce Clause. Amerada Hess Corp. v. Director Div. of Taxation, N.J. Department of the Treasury, 490 U.S. 66, 75-79 (1989). The tax in this case is discriminatory in its practical effect in that it could result in multiple taxation on interstate travelers, while intrastate travelers would not subject to the same burdens. This result is demonstrated infra in this Court's discussion of apportionment.

Relation to State Services

The last prong of the Complete Auto test inquires as to whether or not the tax imposed is related to the presence and activities of the tax payer within the state. The purpose of such an inquiry is to prevent the state's tax burden from hindering those who do not benefit from the services provided by the state. See Commonwealth Edison v. Montana, 453 U.S. 609 (1981).

There is no dispute that the bus passengers/tax payers in this case that travel on intrastate routes in Oklahoma benefit from the services provided by Oklahoma. However, the activities in this case concern actions that occur, at least in part, out of the confines of Oklahoma. The passengers who travel out of the state of Oklahoma, but purchased their tickets in Oklahoma, pay taxes on this transportation, yet for the period that they are not in Oklahoma they do not receive the benefit of Oklahoma's services. Therefore there is no relation

between some the activities attempted to be taxed in this case and the services provided by the State and as a result the tax fails the last prong of Complete Auto.

After a De Novo review of the Bankruptcy Judge's denial of the Appellant's Claim in Bankruptcy No. 90-00985-B-11, it is the Opinion of the Court that because the tax as applied in this case does not satisfy the Supreme Court's test in Complete Auto it was properly denied. The Bankruptcy Court's Order is AFFIRMED.

DONE at Brownsville, Texas this 4th day of October, 1993.

/s/ Filemon B. Vela
FILEMON B. VELA
United States District Judge

Supreme Court, U.S.
FILED
AUG 10 1994
OFFICE OF THE CLERK

(3)

No. 93-1677

In the
# Supreme Court of the United States
OCTOBER TERM, 1993

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STATE OF OKLAHOMA, EX REL.
OKLAHOMA TAX COMMISSION,

*Petitioner,*

*vs.*

JEFFERSON LINES, INC.,

*Respondent.*

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ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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## JOINT APPENDIX

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PETITION FOR CERTIORARI FILED APRIL 21, 1994
CERTIORARI GRANTED JUNE 13, 1994

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## RELEVANT DOCKET ENTRIES

| DATE | ENTRY |
|---|---|
| Aug. 15, 1990 | Proof of Claim of the Oklahoma Tax Commission, Claim # 603 |
| Aug. 15, 1990 | Proof of Claim of the Oklahoma Tax Commission, Claim # 604 |
| Aug. 16, 1990 | Proof of Claim of the Oklahoma Tax Commission, Claim # 605 |
| Aug. 16, 1990 | Proof of Claim of the Oklahoma Tax Commission, Claim # 606 |
| Nov. 1, 1990 | Debtor's Notice of Hearing and Omnibus Objection to Proofs of Claim Numbered 138, 168, 199, 317, 368, 375, 396, 415, 471, 603, 604, 605, 606 and 610 and Memorandum |
| Jan. 23, 1991 | Amended Proof of Claim of the Oklahoma Tax Commission, Claim # 617 |
| Jan. 23, 1991 | Amended Proof of Claim of the Oklahoma Tax Commission, Claim # 618 |
| Feb. 10, 1992 | Stipulation of Oklahoma Tax Commission and Debtor, Jefferson Lines, Inc. |

## RELEVANT DOCKET ENTRIES (cont'd)

| DATE | ENTRY |
|---|---|
| May 14, 1992 | Order of the U.S. Bankruptcy Court, District of Minnesota, Third Division, sustaining Debtor's Objection to the Claim of the Oklahoma Tax Commission |
| Dec. 22, 1992 | Memorandum and Order of the U.S. District Court, District of Minnesota, Third Division, affirming the Order of the Bankruptcy Court |
| Jan. 21, 1994 | Opinion and Judgment of the U.S. Court of Appeals for the Eighth Circuit, affirming the judgment of the District Court. |



IN THE UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

IN RE:

JEFFERSON LINES, INC., CASE NO. 3-89-04137-DDO

Debtor. [Filed Feb. 10, 1992]

## STIPULATION

The Oklahoma Tax Commission ("Commission") and Jefferson Lines, Inc. ("Jefferson") hereby stipulate, by and through their respective representatives, to the following facts and legal issues, and further stipulate that the same shall be accepted as true and correct for purposes of the above-referenced Bankruptcy Case, No. 3-89-04137-DDO, without the necessity of any evidence being offered in support thereof. All stipulated facts and issues shall be conclusive only for the purpose of the above-referenced case, including appeals. This stipulation will not be conclusive in any subsequent proceeding to which either Jefferson or the Commission is a party.

1. Jefferson is a corporation organized pursuant to the laws of Minnesota. Jefferson was qualified to do business in the State of Oklahoma on April 11, 1988.

2. Jefferson operated in Oklahoma as a common carrier providing bus services. Jefferson sells tickets

for both intrastate and interstate routes. "Intrastate" routes are those which both originate and terminate within the State of Oklahoma. "Interstate" routes are those which originate in Oklahoma and terminate in a state other than Oklahoma.

3. K.G. Lines, Inc., operated under Oklahoma Sales Tax Permit No. 195433.

4. M.K.& O. Coach Lines, Inc., operated under Oklahoma Sales Tax Permit No. 246600.

5. Oklahoma Transportation Company operated under Oklahoma Sales Tax Permit No. 268820.

6. Jefferson filed for bankruptcy protection in this Court on October 27, 1989.

7. The Commission, in response to Jefferson's bankruptcy, filed four proof of claims represented herein as Nos. 603, 604, 605 and 606 on August 15, 1990, August 15, 1990, August 16, 1990, and August 16, 1990, respectively.

8. On October 31, 1990, Jefferson filed an Omnibus Objection to Proof of Claim objecting to Claim Nos. 603, 604, 605 and 606.

9. On January 23, 1991, the Commission filed Amended Proof of Claim Nos. 617 and 618 (which amend Claim Nos. 603 and 604 respectively), purporting to represent priority and administrative claims for various sales and withholding taxes.

10. The only periods and amounts involved in this present proceeding are those pursuant to Sales Tax



Permit No. 246600. The dispute involves the months of September, 1989; October, 1989; January, 1990; and February, 1990. The total amount in controversy is $46,659.15. The Commission hereby withdraws all amounts listed in Claim Nos. 603, 604, 605, 607, 617 and 618, which are claimed against Jefferson that relate to Sales Tax Permit Nos. 195433, 268820, or Withholding Tax Permit No. 730566792F 1–27, 731250251F 1–27.

11. Jefferson has been operating under a confirmed Plan of Reorganization since August 3, 1990.

12. The disputed amount relates to tickets sold in Oklahoma where the ultimate destination was outside the State of Oklahoma.

13. Jefferson deducted all interstate tickets sold in Oklahoma from its total taxable sales for purposes of determining the amount of sales tax due the State of Oklahoma.

14. The Commission reviewed M.K.& O. Coach Lines, Inc. sales tax reports for Permit No. 246600 and disallowed the interstate ticket sales deduction.

15. Oklahoma sales tax is applied at the same tax rate to all intrastate and interstate tickets which are sold in Oklahoma regardless of point of origin or destination.

## ISSUE

Under the Oklahoma Statute 68 O.S. § 1354(C) may the State of Oklahoma assess and collect a sales tax on tickets sold in Oklahoma where the trip originates in

Oklahoma and terminates in a state other than Oklahoma?

/s/ Douglas Price
DOUGLAS PRICE
OKLAHOMA TAX COMMISSION
February 7, 1992

/s/ James M. Blackford
JAMES M. BLACKFORD
Sr. Vice President and Chief
Financial Officer
JEFFERSON LINES, INC.
February 10, 1992



UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

| | |
|---|---|
| In re: | Chapter 11 Case |
| Jefferson Lines, Inc., | BKY Case No. 3-89-4137 |
| Debtor. | ORDER |
| | [Filed May 14, 1992] |

This matter came before the Court on objection by Jefferson Lines, Inc. ("Debtor") to Claim Nos. 603–606 of the Oklahoma Tax Commission ("Commission") for unpaid sales tax in the consolidated amount of $46,659.15. Steven D. DeRuyter represents the Debtor. Douglas F. Price represents the Commission. The Court, having considered the briefs of the parties, and being fully advised in the matter, now makes this ORDER pursuant to the Federal and Local Rules of Bankruptcy Procedure.

I.

The facts are undisputed. Debtor, a Minnesota corporation, is a common carrier providing bus service in Oklahoma and numerous other states. Debtor sells transportation tickets within Oklahoma for both intrastate and interstate routes. "Intrastate routes" are those which originate and terminate within the State of Oklahoma. "Interstate routes" are those which originate in Oklahoma

and terminate in a state other than Oklahoma.[1] The Commission, under authority of Oklahoma law, applies a sales tax at a single specified rate to all intrastate tickets, and to all interstate tickets sold by a common carrier for transportation originating in Oklahoma.

Debtor filed for Chapter 11 relief on October 27, 1989. While operating under Sales Tax Permit No. 246600, Debtor deducted all interstate route tickets sold in Oklahoma in computing its total taxable sales. The Commission filed claims in the Debtor's estate seeking payment of the tax on interstate route tickets sold during September and October, 1989 and January and February, 1990. The total amount in controversy is $46,659.15.[2]

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[1] Additionally, Debtor has routes which originate outside of Oklahoma and terminate within Oklahoma; and routes which originate outside of Oklahoma, pass through Oklahoma, and terminate in a state other than Oklahoma. Although these are also interstate routes, Oklahoma does not tax interstate transactions regarding transportation that does not originate in Oklahoma. Accordingly, except where specifically referenced, the term "interstate routes" in this opinion means only those interstate routes for transportation originating in Oklahoma.

[2] The Commission filed Proofs of Claim Nos. 603 and 604 on August 15, 1990, and 605 and 606 on August 16, 1990. The Commission asserts entitlement under these claims to treatment as a priority and administrative creditor for sales and withholding taxes. In its Omnibus Objection to Proofs of Claim, Debtor objects to these claims. On January 23, 1991, the Commission filed Amended Proofs of Claim Nos. 617 and 618, which amended Claim Nos. 603 and 604.

The parties agree that the Commission has reduced all amounts listed in Claim Nos. 603, 604, 605, 606, 617 and 618 by sales or withholding tax collected, other than the amount of sales tax due Oklahoma under Sales Tax Permit No. 246600.



Debtor objects to allowance of the claims on the grounds that applying Oklahoma's sales tax to the gross receipts of tickets sold in Oklahoma for its interstate routes violates the Commerce Clause of the United States Constitution.

II.

Does the Oklahoma sales tax statute which levies a tax on the gross receipts from sales of transportation over interstate routes violate the Commerce Clause of the United States Constitution?

III.

Oklahoma collects sales tax from the Debtor under the Oklahoma Sales Tax Code. 68 O.S. § 1354 (1)(C).[3] The Debtor argues that Oklahoma's imposition of a tax on the gross receipts of tickets sold in Oklahoma for interstate

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[3] 68 O.S. § 1354 (1)(C) reads in pertinent part:

(1) There is hereby levied upon all sales, not otherwise exempted in Oklahoma Sales Tax Code, Section 1350 *et seq.* of this title, an excise tax of four and one-half percent (4.5%) of the gross receipts or gross proceeds of each sale of the following:

(C) Transportation for hire to persons by common carriers, including railroads both steam and electric, motor transportation companies, taxicab companies, pullman car companies, airlines, and other means of transportation for hire.

route transportation violates the Commerce Clause. U.S. Const., Art. I, § 8, cl. 3.[4]

Prior to 1977, the United States Supreme Court held that,

> [i]t was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing business.

*Western Live Stock v. Bureau of Revenue*, 303 U.S. 250, 254 (1938). Thus, state taxation of transactions involving interstate commerce was not necessarily regarded as a violation of the Commerce Clause. However, the Court also had ruled that any state tax levied for the expressed "privilege of doing business" in a state was a *per se* violation of the Commerce Clause. *See*: *Spector Motor Service, Inc. v. O'Connor*, 340 U.S. 602 (1951). In 1977, the Court abandoned the *per se* analysis in *Spector Motor Service* in favor of a four-part test to determine whether a challenged state tax on interstate commercial transactions withstands constitutional scrutiny, regardless of its statutorily expressed purpose. *See*: *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977).

In *Complete Auto Transit*, the Court recognized prior decisions which held that such a tax does not violate the Commerce Clause if:

[4] Art. I, § 8, cl. 3 reads in pertinent part:

> The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.



> **the tax is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State.**

*Id.* at 279.[5] *See also*: *American Trucking Assoc. v. Scheiner*, 483 U.S. 266 (1978); *Goldberg v. Sweet*, 488 U.S. 252 (1989). Therefore, in order for the Oklahoma tax to survive a Commerce Clause challenge, its application must satisfy each part of the *Complete Auto Transit* test.

**A. The tax must be applied to an activity with a substantial nexus to the taxing State.**

The Debtor claims that the Oklahoma statute fails to meet the first part of the *Complete Auto Transit* test, arguing that the mere purchase of an interstate ticket in Oklahoma constitutes the only connection between the activity taxed and the taxing state. However, the Supreme Court has found that maintenance of two non-sales offices in California by a non-profit corporation created a sufficient nexus to justify a tax on sales made to California residents from the corporation's headquarters in Washington, D.C. *National Geographic Soc'y v. California Bd. of Equalization*, 430 U.S. 551 (1977). Debtor's contact with Oklahoma involves more than mere sales of interstate route tickets. It also sells intrastate tickets,

[5] The Court went on to affirm the Mississippi Supreme Court's judgment that a Mississippi tax on the "privilege of doing [interstate] business" was not a violation of the Commerce Clause,noting that the appellant relied only on the *Spector per se* rule, and did not object to the tax based on application of the four-part test. *See Complete Auto Transit*, 430 U.S. at 289.

pays sales tax on intrastate ticket sales, and maintains a presence in Oklahoma to facilitate both intrastate and interstate ticket sales. Additionally, Oklahoma issues the Debtor sales tax permits to facilitate collection and payment of sales tax. Although the Debtor views its nexus with Oklahoma as *de minimis*, it has a sufficient nexus to the taxing state under *National Geographic* to satisfy the first part of the *Complete Auto Transit* test.

**B. The tax must be fairly apportioned.**

In 1989, the *Goldberg* Court held "the central purpose behind the apportionment requirement is to ensure that each State taxes only its fair share of an interstate transaction." *Goldberg*, 488 U.S. at 260–261. *See*: *Container Corp. of America v. Franchise Tax Bd.*, 463 U.S. 159, 169 (1983). To determine whether the apportionment part of the *Complete Auto Transit* test is satisfied, the Court examines whether the tax is internally and externally consistent. *Goldberg*, 488 U.S. at 261. *American Trucking*, 483 U.S. at 284–285.

"To be internally consistent, a tax must be structured so that if every State were to impose an identical tax, no multiple taxation would result." *Goldberg*, 488 U.S. at 261. *See*: *Container Corp.*, 463 U.S. at 169. The Debtor suggests the Oklahoma tax lacks internal consistency because other states may enact laws that tax the interstate portion of the tickets sold in Oklahoma. However, the *Goldberg* Court declared the proper standard for the internal consistency test to be comparison with an *identical* tax, not a similar tax. *Goldberg*, 488 U.S. at 261. Therefore, each state could enact an identical tax without producing multiple taxation if it were levied against interstate route tickets sold only within its own state for transportation originating there. Under the *Goldberg* standard, the Oklahoma sales tax is internally consistent.



The external consistency test is satisfied if the State taxes only that portion of revenues from the interstate activity which reasonably reflects the in-state component of the interstate activity being taxed. *Goldberg*, 488 U.S. 262. *See*: *Container Corp.*, 463 U.S. at 169. In making a practical inquiry, the Court noted:

> [i]n previous cases we have endorsed apportionment formulas based on the miles a bus, train, or truck traveled within the taxing State. But those cases all dealt with the movement of large physical objects over identifiable routes, where it was practicable to keep track of the distance actually traveled within the taxing State.

*Goldberg*, 488 U.S. at 264.[6] *See, e.g.*, *Central Greyhound Lines v. Mealey*, 334 U.S. 653 (1948) (buses); *American Trucking*, 483 U.S. 266 (1987) (trucks); *Japan Line v. County of Los Angeles*, 441 U.S. 434 (1979) (cargo containers); *Complete Auto Transit*, 430 U.S. 274 (1977) (motor carriers); *Michigan-Wisconsin Pipe Line v. Calvert*, 347 U.S. 157 (1954) (oil pipelines). In *Central Greyhound*, a case with similar facts, New York taxed the gross receipts from ticket sales for interstate routes out of New York. The *Central Greyhound* Court held that the New York tax would withstand a Commerce Clause challenge if it were apportioned by mileage traveled within New York. *Central Greyhound*, 334 U.S. at 663–664. The Court found that:

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[6] The *Goldberg* Court held that apportioning by mileage the electronic impulses of a telephonic transmission would create "insurmountable administrative and technological barriers."

> [b]y its very nature an unapportioned gross receipts tax makes interstate transportation bear more than 'a fair share of the cost of the local government whose protection it enjoys.'

*Central Greyhound*, 334 U.S. at 663, *quoting*, *Freeman v. Hewit*, 329 U.S. 249 (1947).

The Commission argues that the sales tax is self-apportioning since Oklahoma does not tax interstate tickets sold for routes which originate outside of Oklahoma and terminate within Oklahoma. However, in this Court's view, the *Central Greyhound* analysis is controlling. By taxing the gross receipts from interstate route tickets, the Commission has taxed more than the in-state component of the interstate activity. Accordingly, section 1354(1)(C) is not externally consistent. The tax is not fairly apportioned, and therefore, it fails the second part of the *Complete Auto Transit* test.

**C. The tax must not discriminate against interstate commerce.**

The Debtor argues that the identical four and one-half percent (4.5%) tax on interstate and intrastate tickets clearly discriminates against interstate commerce. In past cases, the Supreme Court has decided that "a tax may violate the Commerce Clause if it is facially discriminatory, has a discriminatory intent or has the effect of unduly burdening interstate commerce". *Amerada Hess Corp. v. Director, Div. of Taxation, N.J. Dep't of the Treasury*, 490 U.S. 66, 75–79 (1989).

Section §1354(1)(C) is applied to all common carriers. Therefore, this statute allocates the tax burden in a facially neutral manner.



To determine if a tax has a discriminatory intent, the *Amerada* Court considered whether the tax was motivated by an intent to confer a benefit on local industry at the expense of interstate commerce. *See also: Bacchus Imports v. Dias*, 468 U.S. 263 (1984), in which a Hawaiian tax exemption for fruit wine was found to promote the local pineapple-wine industry. It does not appear from these facts that § 1354(1)(C) was enacted to promote or benefit Oklahoma common carriers at the expense of out-state common carriers.

In *American Trucking*, the Supreme Court invalidated the imposition of unapportioned lump-sum annual taxes on the operation of trucks and truck tractors as discriminating against interstate commerce. Accordingly, an unapportioned tax discriminates against interstate commerce, except (as in *Goldberg*) where lack of apportionment can be justified by administrative burdens. Therefore, in failing the apportionment part of the *Complete Auto Transit* test, the Oklahoma tax discriminates against interstate commerce. Section 1354(1)(C) fails the third part of the *Complete Auto Transit* test.

**D. The tax must be fairly related to the services provided by the State.**

The fourth part of the *Complete Auto Transit* test requires that the tax be fairly related to the activities of the Debtor in Oklahoma. *Goldberg*, 488 U.S. at 266. This part "focuses on the wide range of benefits provided to the taxpayer, not just the precise activity connected to the interstate activity at issue." *Id.* at 267. In *D. H. Holmes Co. v. McNamara*, 486 U.S. 24, the Supreme Court found that police and fire protection, mass transit service and public road maintenance provided by the State of Louisiana caused the tax to be related to the activities of

Holmes in running retail stores and a mail order business in Louisiana. *Holmes*, 486 U.S. at 32. In this case, the Debtor receives police and fire protection, along with other public services, at the locations where it sells tickets and loads its buses. The Debtor also receives benefit from police protection and public road maintenance on its Oklahoma routes. Therefore, the Oklahoma tax is fairly related to the business activities of the Debtor in Oklahoma.

IV.

Based on the foregoing, the Debtor is entitled to an order sustaining its objection on the grounds that the claim is for the payment of a tax on the gross receipts from the Debtor's sales of transportation over interstate routes which tax is levied in violation of the Commerce Clause of the Untied States Constitution.

Now, therefore, IT IS HEREBY ORDERED:

The objection of the Debtor to the claim of the Oklahoma Tax Commission is sustained.

Dated: 5/13/92

/s/ Dennis D. O'Brien
Dennis D. O'Brien
U.S. Bankruptcy Judge



UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

In re:

Jefferson Lines, Inc.,

Debtor,

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State of Oklahoma,
ex rel. Oklahoma Tax
Commission,

Appellant,

v.

Jefferson Lines, Inc.,
and Wesley B. Huisinga,
United States Trustee,

Appellees.

Civ No. 3–92–467

MEMORANDUM AND ORDER

[Filed Dec. 22, 1992]

The State of Oklahoma appeals the bankruptcy court's[1] upholding of Jefferson Lines Inc.'s objection to the Oklahoma Tax Commission's claims for unpaid sales taxes. For reversal, Oklahoma argues that the levy of its sales tax on the gross sale price of interstate bus tickets sold in

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[1] The Honorable Dennis D. O'Brien, United States Bankruptcy Judge for the District of Minnesota.

Oklahoma does not violate the Commerce Clause of the United States Constitution. The Court affirms.

## I. BACKGROUND

The parties stipulate to the facts and to the legal issue in this case. Jefferson provides bus service in Oklahoma on both intra- and interstate routes. Jefferson filed for bankruptcy protection in the District of Minnesota in 1989. In response, the Commission filed several proofs of claims, all of which relate to tickets sold in Oklahoma for travel from Oklahoma to a destination in another state.

According to the Commission, Okla. Stat. tit. 68, § 1354(1)(C) (1991) required Jefferson to collect and remit a sales tax on the gross price of every bus ticket it sold in Oklahoma, regardless of what state the trip originated or terminated in. In remitting its taxes for the relevant periods, however, Jefferson deducted from its total sales the amount attributable to the sales of interstate tickets. When the Commission submitted its proofs of claims with respect to these amounts, Jefferson objected. The parties stipulated that the legal issue before the bankruptcy court was "Under the Oklahoma Statute 68 O.S. § 1354(C) may the State of Oklahoma assess and collect a sales tax on tickets sold in Oklahoma where the trip originates in Oklahoma and terminates in a state other than Oklahoma?" By an order dated May 13, 1992, the bankruptcy court sustained Jefferson's objections, ruling that the tax imposed by § 1354(1)(C) violates the Commerce Clause, U.S. Const. art. I, § 8, cl. 3, because it is not fairly apportioned and because it discriminates against interstate commerce.



## II. DISCUSSION

Under 28 U.S.C. § 158(A) (1988), this Court has appellate jurisdiction over final judgments and orders of the United States Bankruptcy Court for the District of Minnesota. On appeal, this Court is to review de novo the bankruptcy court's conclusions of law. *In re Muncrief*, 900 F.2d 1220, 1224 (8th Cir. 1990).

A state tax on interstate commerce does not violate the Commerce Clause if it "[1] is applied to an activity with a substantial nexus with the taxing State, [2] is fairly apportioned, [3] does not discriminate against interstate commerce, and [4] is fairly related to the services provided by the state." *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977). As Oklahoma's tax must satisfy all four prongs of the *Complete Auto* test to survive a Commerce Clause challenge, *see Goldberg v. Sweet*, 488 U.S. 252 (1989), a finding that it fails one prong would obviate the need to apply the other prongs.

The Court turns first to the apportionment prong. "[T]he central purpose behind the apportionment requirement is to ensure that each state taxes only its fair share of an interstate transaction." *Id.* at 260–61. To determine whether a tax is fairly apportioned, a court must examine whether it is internally and externally consistent. *Id.* at 261.

A tax is internally consistent if no multiple taxation would result were every state to impose an identical tax. *Id.* As a bus ticket can be sold in only one state, even if every state were to tax the sale of bus tickets within its borders, no purchasers would be taxed more than once. Therefore, Oklahoma's tax is internally consistent.

A tax is externally consistent if it is levied only on "that portion of the revenues from the interstate activity

which reasonably reflects the in-state component of the activity being taxed." *Id.* at 262. Oklahoma's tax on the gross purchase price of intrastate bus tickets probably reasonably reflects the relative benefit Oklahoma confers on intrastate riders in the form of highway maintenance and other such services. However, by also taxing the entire purchase price of an interstate ticket, Oklahoma receives revenues that exceed the amount reasonably attributable to the Oklahoma leg of the bus journey. Thus, Oklahoma's tax does not appear to be fairly apportioned. *See Greyhound Lines, Inc. v. Mealy*, 334 U.S. 653, 662–63 (1948) (invalidating a state tax on the gross receipts of bus company when the tax was levied on the entire mileage of a bus trip although part of the trip was outside the state).

Nevertheless, Oklahoma argues that its tax is externally consistent, relying on *Goldberg*. The tax challenged in *Goldberg* was levied on the gross charge of interstate telecommunications originated or received in Illinois and charged to an Illinois service address. *Goldberg*, 488 U.S. at 257. Illinois provided a credit to any taxpayer who was taxed by another state on a call taxed by Illinois. *Id.*

The *Goldberg* Court concluded that the Illinois tax was externally consistent because the risk of multiple taxation was slight and because apportioning a tax upon telecommunications was administratively virtually impossible. The Court concluded that the risk of multiple taxation was slight because states through which a telephone signal merely passes probably do not have a sufficient nexus to tax the call. *Id.* at 263. The *Goldberg* Court believed that only two states could have a nexus substantial enough to tax a particular interstate telephone call; a state that taxed interstate calls charged to a service address within the state, and a state that taxed interstate



calls billed or paid within the state. *Id.* Thus, under the Illinois tax it was possible that a taxpayer with service and billing addresses in different states could be taxed twice on the same call. *Id.* This "limited possibility" of multiple taxation was not enough to invalidate the Illinois tax because Illinois provided for a credit in the event of multiple taxation. *Id.* at 264.

The *Goldberg* Court also found that apportioning the tax on a telephone call would "produce insurmountable administrative and technological barriers." *Id.* at 264–65. The Court noted that telephone networks offer billions of potential paths from one point to another, and that computers can switch calls rapidly and frequently from one path to another without regard to state lines. *Id.* at 254–55. Thus, it is virtually impossible to trace and record the path of an individual call. *Id.* at 255. Accordingly, the Court held that the Illinois tax was fairly apportioned because the risk of multiple taxation was low, Illinois provided a credit in case of multiple taxation, and it is not administratively feasible to apportion taxes on telephone calls. *Id.* at 265.

Oklahoma argues that its tax is analogous to the tax in *Goldberg* under the external consistency test because Oklahoma is the only state with a sufficient nexus to tax the purchase of bus tickets. Oklahoma emphasizes that its tax is a sales tax upon the purchasers of bus tickets which "retailers" such as Jefferson collect and hold in trust for the state. Because its tax is only on the sale of tickets within the state, Oklahoma argues, no other state can impose such a tax on the same ticket. Thus, Oklahoma concludes, *Goldberg* controls and its tax, like Illinois' telecommunications tax, is externally consistent.

The *Goldberg* Court emphasized that the external consistency test "is essentially a practical inquiry." *Id.* at

264. Hence, Oklahoma describes its analysis as practical. However, Oklahoma's analysis exalts formalism over practical inquiry because it ignores a very real potential for double taxation. For example, Texas could tax Jefferson on the revenue it derived from the transportation of passengers within Texas. *See, e.g.*, *Greyhound Lines*, 334 U.S. at 662–63 (endorsing such a method of apportionment). If that were the case, a Jefferson passenger traveling from Tulsa to Houston would effectively be taxed twice on the Texas portion of the journey. The fact that Oklahoma levies a sales tax on the ticket purchaser while Texas would levy its tax on Jefferson makes no practical difference, as Jefferson would pass the Texas tax on to the purchaser by increasing the price of the ticket. Thus, although Oklahoma may be the only state with a sufficient nexus to tax the *purchase* of a bus ticket in Oklahoma, other states still have a sufficient nexus to tax the very same activity that Oklahoma is taxing. Because the potential for multiple taxation is much higher in this case than in *Goldberg*, and because Oklahoma provides no credit in case of multiple taxation, Oklahoma's tax is quite unlike the telecommunications tax in *Goldberg*.

Oklahoma's tax also differs from the tax in *Goldberg* in that apportioning a tax on bus ticket purchasers poses no significant administrative burden. Although the *Goldberg* Court held that apportioning a tax on telecommunications was not feasible, it noted that in previous cases the Supreme Court has endorsed apportionment formulas based on the number of miles a bus, train, or truck travels with a taxing state. *Goldberg*, 488 U.S. at 264. These cases, it stated, all involved "the movement of large physical objects over identifiable routes, where it was practicable to keep track of the distance actually traveled within the taxing State." *Id.* Oklahoma does not argue,



nor does the Court have reason to believe, that apportioning a tax on bus travel on the basis of the number of miles traveled within the state is impracticable.

Therefore, the Court concludes that, under the standard enunciated in *Goldberg*, Okla. Stat. tit. 68, § 1354(1)(C) (1991) is not externally consistent when applied to bus tickets purchased in Oklahoma for travel to a destination in another state. Because the Oklahoma statute thus fails the apportionment prong of the *Complete Auto* test, it violates the Commerce Clause. Accordingly, the order of the bankruptcy court is AFFIRMED.

DATED: December 22, 1992.

/s/ Donald D. Alsop
DONALD D. ALSOP,
Senior Judge
United States District Court

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 93-1684MN

| | | |
|---|---|---|
| In re Jefferson Lines, Inc., Debtor; State of Oklahoma ex rel. Oklahoma Tax Commission, Appellant, v. Jefferson Lines, Inc., Appellee. | * | On Appeal from the United States District Court for the District of Minnesota. |

Submitted: November 11, 1993
Filed: January 21, 1994

Before RICHARD S. ARNOLD, Chief Judge, BEAM, Circuit Judge, and JACKSON*, District Judge.

RICHARD S. ARNOLD, Chief Judge.

* The Hon. Carol E. Jackson, United States District Judge for the Eastern District of Missouri, sitting by designation.



In 1989, the Oklahoma Tax Commission sought payment from Jefferson Lines, Inc., the debtor in a Chapter 11 bankruptcy proceeding, for unpaid sales tax on the gross price of interstate bus tickets sold in Oklahoma. The State law, Okla. Stat. Title 68, § 1354(1)(C), requires Jefferson to collect and remit sales tax on the gross price of every bus ticket sold in Oklahoma.[1] The statute applies to the sale of all tickets sold in Oklahoma, regardless of where the trip begins or ends. Jefferson is a bus line providing transportation service for both intrastate and interstate travel. Jefferson objects to paying the sales tax for the miles travelled outside of Oklahoma, arguing that the sales tax violates the Commerce Clause of the United States Constitution, Article I, § 8, cl. 3. The Bankruptcy

[1] The relevant part of Okla. Stat. Title 68, § 1354 (Supp. 1988), states:

> (1) There is hereby levied upon all sales, not otherwise exempted in Oklahoma Sales Tax Code, Section 1350 *et seq.* of this title, an excise tax of four percent (4%) of the gross receipts or gross proceeds of each sale of the following:
>
> * * *
>
> (C) Transportation for hire to persons by common carriers, including railroads both steam and electric, motor transportation companies, taxicab companies, pullman car companies, airlines, and other means of transportation for hire.

Court[2] agreed with Jefferson. The District Court[3] affirmed. So do we.

A state tax on interstate commercial activity violates the Commerce Clause unless it "is applied to an activity with a substantial nexus to the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services or benefits provided by the State." *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977). If a tax statute fails to meet any of these four standards, the statute will offend the Commerce Clause. See *Goldberg v. Sweet*, 488 U.S. 252 (1989). Both the District Court and the Bankruptcy Court held the statute was not fairly apportioned, thus failing the second standard of *Complete Auto*. We begin our inquiry by examining the issue of apportionment.

To determine whether a tax is fairly apportioned a court must ask whether the tax is both "internally" and "externally consistent." *Goldberg*, 488 U.S. at 261. The purpose of this inquiry "is to ensure that each State taxes only its fair share of an interstate transaction." *Goldberg*, 488 U.S. at 260–61.

For a tax to be internally consistent, it "must be structured so that if every State were to impose an identical tax, no multiple taxation would result." *Id.*, at 261. The Oklahoma tax meets this test. As noted by the District Court and the Bankruptcy Court, an individual bus ticket can be sold in only one state. Therefore, even if every state taxed bus tickets sold within its borders, for all

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[2] The Honorable Dennis D. O'Brien, United States Bankruptcy Judge for the District of Minnesota.

[3] The Honorable Donald D. Alsop, Senior United States District Judge for the District of Minnesota.



transportation originating within that state, no customer would be taxed more than once. Thus, the Oklahoma tax is internally consistent.

But is the Oklahoma tax externally consistent? "The external consistency test asks whether the State has taxed only that portion of the revenues from the interstate activity which reasonably reflects the in-state component of the activity being taxed." *Goldberg*, 488 U.S. at 262. When we evaluate the arguments, we must look beyond formalism and consider the practical and economic effect of the tax on interstate commerce. *Id.* at 264; see also *Central Greyhound Lines, Inc. v. Mealy*, 334 U.S. 653, 659–60 (1948).

The Commission contends that the tax is externally consistent and does not need to be apportioned because the tax is on the sale of the ticket and therefore is imposed only on local activity. To defend the assertion that only the sale of the ticket is taxed and not the use of the ticket, the Commission explains that the Oklahoma sales tax is based solely on the purchase price of the ticket, and that once the sale has occurred, the taxable event is complete. In essence, the Commission argues that the taxable activity is the sale of a ticket, not of transportation. This argument is too technical and flies in the face of how bus-ticket prices are set. A ticket price is set, at least partially, on the number of miles travelled. To say that only the purchase of a ticket is taxed, and not the use of the ticket, ignores the fact that the real value of the ticket is the right to ride a bus. The ticket without the travel would be of scant value to a customer. We will not separate the sale of a piece of paper from the service which it represents. To hold otherwise would elevate form over substance and require this Court to ignore economic realities.

Both courts below relied, correctly we think, on *Central Greyhound Lines, Inc. v. Mealy, supra.* In this 1948 case, New York levied a gross-receipts tax on a New York-based bus company. All of the company's revenues were subject to the tax, even though they included large sums attributable to transportation services performed in New Jersey. The Supreme Court held the tax invalid because it was not apportioned as between intrastate and interstate transportation revenues. The Court said that "[b]y its very nature an unapportioned gross receipts tax makes interstate transportation bear more than 'a fair share of the cost of local government whose protection it enjoys.'" 334 U.S. at 663 (quoting *Freeman v. Hewit*, 329 U.S. 249, 253 (1946)). The vice of the New York gross-receipts tax was that "it [laid] 'a direct burden upon every transaction in [interstate] commerce by withholding, for the use of the State, a part of every dollar received in such transactions.'" *Central Greyhound*, 334 U.S. at 663 (quoting *Crew Levick Co. v. Pennsylvania*, 245 U.S. 292, 297 (1917)) (citations omitted).

The same thing is true here. By levying a sales tax on the total price of tickets for interstate transportation, Oklahoma is attempting to tax the gross receipts from the sale of transportation outside its borders. It is taxing more than the in-state component of the interstate activity. If a customer, for example, buys a ticket in Tulsa, Oklahoma, to travel from Tulsa to Nashville, Tennessee, most of the trip will occur outside of Oklahoma. Under the scheme urged by the Commission, Oklahoma receives tax revenues attributable to the entire trip, even though it bears none of the cost of repairing roads in Arkansas, nor does it provide any police or fire protection for miles travelled in Tennessee. Like the New York tax in issue in *Central Greyhound*, the Oklahoma sales tax is a direct burden on



every transaction in interstate commerce, and the amount of the burden bears no relationship to the portion of the trip that occurs within the taxing state.

The Commission suggests that *Central Greyhound* is distinguishable, because the tax there was a gross-receipts tax, formally levied upon the seller, whereas here a sales tax is involved, formally levied on the buyer, though collected by the seller and remitted to the State by it. The distinction is not significant enough to bear the weight that the Commission seeks to place upon it. Sales taxes and gross-receipts taxes have much in common. They are both measured by the gross receipts of the bus company, and are due whether the company makes a profit or not, and regardless of the cost to it of rendering the transportation service represented by the ticket sold. A gross-receipts tax is obviously an important part of the bus company's cost of doing business. The likelihood that it will be passed on to the customer, in whole or in part, is great, if the company expects to continue in business. Conversely, a sales tax, though in form levied upon the buyer of the ticket, has to be paid by the bus company whether it collects the tax from its customers or not. The bus company must remit the tax to the state whether or not it has added the tax to the price of the ticket as such. Okla. Stat. Title 68, § 1361(A) (Supp. 1988). In both situations, the amount of the tax varies directly with the amount of miles travelled, whether those miles are inside the taxing state or outside. This is a classic instance of an unapportioned tax, in our view. *Central Greyhound* was decided before the adoption of the presently applicable four-part analysis by the *Complete Auto* Court, but we believe that the reasoning of *Central Greyhound* is still good when considering whether a tax is externally consistent as that term is used in *Complete Auto.*

The unapportioned Oklahoma sales tax on interstate travel is not externally consistent when applied to bus tickets bought in Oklahoma for travel to another state. Apportioning the tax in accordance with the miles travelled within the state does not present insurmountable administrative burdens, nor is it technologically unfeasible for any reason. See *Goldberg*, 488 U.S. at 264. Therefore, this tax fails the apportionment standard of *Complete Auto*. Because the tax is not fairly apportioned, it is unnecessary to examine any of the other *Complete Auto* factors to hold that the tax violates the Commerce Clause. Accordingly, the judgment of the District Court is

Affirmed.

[Clerk's attestation omitted in printing.]

(4)

No. 93-1677



In the
# Supreme Court of the United States
OCTOBER TERM, 1993

STATE OF OKLAHOMA, EX REL.
OKLAHOMA TAX COMMISSION,
*Petitioner,*

*vs.*

JEFFERSON LINES, INC.,
*Respondent.*

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT*

## BRIEF FOR THE PETITIONER

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9 pp

## QUESTION PRESENTED

Whether the State of Oklahoma may constitutionally impose on the in-state purchaser, and require the in-state vendor to collect, a sales tax on the purchase of bus transportation sold within the State, measured by the full purchase price of the ticket, even though the ultimate destination or a portion of the route to be travelled extends beyond the State's borders.

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*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT*

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## BRIEF FOR THE PETITIONER

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## OPINIONS BELOW

The opinion of the Eighth Circuit Court of Appeals is reported as *State of Oklahoma ex rel. Oklahoma Tax Commission v. Jefferson Lines, Inc. (In re Jefferson Lines, Inc.)*, 15 F.3d 90 (8th Cir. 1994), and is reprinted in the Joint Appendix at J.A. 24.

The Memorandum and Order of the United States District Court for the District of Minnesota, Third Division, has not been reported. It is reprinted in the Joint Appendix at J.A. 17. The Order of the United States

Bankruptcy Court for the District of Minnesota, Third Division, is not reported and is reprinted in the Joint Appendix at J.A. 7.

## JURISDICTION

The opinion of the Court of Appeals for the Eighth Circuit was entered on January 21, 1994. The petition for writ of certiorari was filed in this Court on April 21, 1994, and was granted on June 13, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Commerce Clause of the United States Constitution, Article I, Section 8, Clause 3, provides:

> The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes. . . .

Pertinent sections of the Oklahoma Sales Tax statutes are as follows:

OKLA. STAT. tit. 68, § 1354(1) (Supp. 1988):

> There is hereby levied upon all sales, not otherwise exempted in the Oklahoma Sales Tax Code, an excise tax of four percent (4%)[1] of the gross receipts or gross proceeds of each sale of the following:
>
> (A) Tangible personal property;

* * * *

[1] The rate was changed to 4½% effective Feb. 1, 1990. 1989 Okla. Sess. Laws, 1st Ex.Sess., ch.2, § 101.



> (C) Transportation for hire to persons by common carriers, including railroads both steam and electric, motor transportation companies, taxicab companies, pullman car companies, airlines, and other means of transportation for hire;

* * * *

OKLA. STAT. tit. 68, § 1361 (Supp. 1988):

> (A) The tax levied by this article shall be paid by the consumer or user to the vendor as trustee for and on account of this state. Each and every vendor in this state shall collect from the consumer or user the full amount of the tax levied by this article, or an amount equal as nearly as possible or practicable to the average equivalent thereof. Every person required to collect any tax imposed by this article, and in the case of a corporation, each principal officer thereof, shall be personally liable for said tax.
>
> (B) Vendors shall add the tax imposed by this article, or the average equivalent thereof, to the sales price, charge, consideration, gross receipts or gross proceeds of the sale of tangible personal property or services taxed by this article, and when added such tax shall constitute a part of such price or charge, shall be a debt from the consumer or user to vendor until paid, and shall be recoverable at law in the same manner as other debts.

* * * *

## STATEMENT OF THE CASE

### 1. Nature of the Controversy

The Oklahoma Sales Tax Code imposes a tax, to be paid by the purchaser and collected by the vendor, upon the sale of tangible personal property and certain services, including transportation for hire by common carriers such as bus companies, where such sales occur within the State. The tax is added to the purchase price of the item or service purchased, and constitutes a debt from the consumer/user to the vendor until paid. The vendor becomes liable if the vendor fails to collect or remit the tax. OKLA. STAT. tit. 68, §§ 1354(1), 1361 (Supp. 1988).

Jefferson Lines, Inc. ("Jefferson") is a common carrier providing bus service in Oklahoma as well as other states, and sells tickets in Oklahoma from various locations across the state. J.A. 3–4. All of the sales here in question were made within the State. J.A. 5. Jefferson's ticket sales can be classified into two categories. The first category consists of tickets sold in Oklahoma for transportation that both originates and terminates within the State of Oklahoma. The second category consists of tickets sold in Oklahoma for transportation originating in Oklahoma and terminating in some other state. *Ibid.*

During the periods in question Jefferson, operating under an Oklahoma sales tax permit previously issued to M. K. & O. Coach Lines, Inc.,[2] collected and remitted Oklahoma sales tax only on ticket sales involving solely intrastate travel. On its Oklahoma sales tax reports, Jefferson reported all sales made in Oklahoma, but then

[2] Prior to the periods in question, M. K. & O. Coach Lines, Inc. was merged into Jefferson Lines, Inc., with Jefferson as the survivor.



deducted those sales where the ultimate destination was outside the State. J.A. 4. Taxes were not collected or remitted on those sales. The Oklahoma Tax Commission ("Commission"), conducting a routine office audit of Jefferson's M. K. & O. sales tax reports for September and October, 1989, and January and February, 1990, discovered Jefferson was not collecting or remitting tax on sales made in Oklahoma where the bus routes involved travel outside the State. The Commission disallowed the sales deductions taken by Jefferson on its sales tax reports and determined the amount of sales tax due on the deducted sales to be $46,659.15. J.A. 4–5.

### 2. The Proceedings Below

Jefferson filed a petition for voluntary relief under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the District of Minnesota, Third Division, on October 27, 1989. On relation of the Tax Commission, the State of Oklahoma filed proofs of claim for priority taxes and administrative claims for the sales taxes that Jefferson, as vendor, was required to collect, but did not, on the bus tickets sold in Oklahoma. The bankruptcy court's jurisdiction to hear and decide those claims is provided by 28 U.S.C., § 157.

Jefferson objected to the Commission's claims, arguing that the imposition of Oklahoma's sales tax on bus tickets sold in Oklahoma violates the Commerce Clause of the United States Constitution, where the trip originates in Oklahoma and terminates in another state. J.A. 5–6. The bankruptcy court agreed, and sustained Jefferson's objection. J.A. 16.

Analyzing Oklahoma's tax on the sales in question under the four-prong test of *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), the bankruptcy court found

that Jefferson's physical presence within the state, its conducting of sales there and its maintenance of facilities in Oklahoma both for sales purposes and for the other physical operations of its business, were sufficient both to satisfy the nexus requirement of *Complete Auto* and to show that the tax was fairly related to the services provided by the state. J.A. 11–12, 15–16.

As to the apportionment prong of *Complete Auto*, the court concluded that, since only one state could tax the sale of bus tickets occurring within its borders, the tax was internally consistent. J.A. 12. However, relying on this Court's decision in *Central Greyhound Lines, Inc. v. Mealey*, 334 U.S. 653 (1948) (a case involving a gross receipts tax on a bus company's revenues from providing interstate transportation), the bankruptcy court concluded that the application of Oklahoma's sales tax to the gross selling price of a bus ticket, without apportionment according to the in-state miles to be travelled, taxed more than the in-state component of an interstate activity and was therefore not externally consistent. J.A. 13–14. Having concluded that Oklahoma's sales tax was therefore not "fairly apportioned," the bankruptcy court then concluded that the tax necessarily discriminated against interstate commerce. J.A. 15. Accordingly, Jefferson's objection to the Commission's claim for uncollected and unremitted sales taxes was sustained.

On appeal, the district court affirmed. J.A. 23. That court, examining only the apportionment prong of the *Complete Auto* test, agreed that Oklahoma's sales tax was internally consistent but, also relying on *Central Greyhound*, similarly concluded that by taxing the entire purchase price of an "interstate" ticket, Oklahoma "receives revenues that exceed the amount reasonably attributable to the Oklahoma leg of the bus journey." J.A. 20. For external consistency purposes, the district court opined that if another state levied a tax on *Jefferson* on the revenues it derived from the transportation of passengers within that state—again citing *Central Greyhound*—that tax would be passed on to the ticket purchaser by an increase in the price of the ticket, thus "effectively" taxing the ticket purchaser twice on the "same activity" that Oklahoma had taxed. J.A. 22. According to the court, the fact that Oklahoma levies a sales tax on the ticket purchaser, while the other state would levy its tax on the bus company, "makes no practical difference." *Ibid.* The order of the bankruptcy court was thus affirmed.



The Eighth Circuit affirmed the district court, also relying, as had the courts below, on *Central Greyhound Lines v. Mealey*. Adopting the reasoning of the lower courts, the court of appeals further opined that there was no "significant" distinction between the gross receipts (income) tax on the bus company in *Central Greyhound* and the sales tax levied here on the ticket purchaser. J.A. 28–29; 15 F.3d 92–93. Therefore, the court concluded, the lack of apportionment of Oklahoma's sales tax on the purchase of a bus ticket in accordance with the miles subsequently to be travelled in Oklahoma was as fatal for external consistency purposes as was the unapportioned-by-mileage gross income tax on the bus company in *Central Greyhound*. Consequently, the opinion and judgment of the district court was affirmed. *Ibid.*

Certiorari to review the decision of the Eighth Circuit Court of Appeals was granted on June 13, 1994.

## SUMMARY OF THE ARGUMENT

The State of Oklahoma imposes a tax, levied upon the consumer and collected by the vendor, upon the sale of

tangible personal property and certain services, including transportation for hire by bus. The tax is imposed upon the sale itself, not upon the thing purchased nor upon anyone's occupation or income; and it is imposed only when the sale occurs within the State. The taxable event is complete when the *sale* is made—in this case, when the bus ticket is bought and paid for.

The courts below erroneously concluded that when the bus transportation purchased included travel outside the State of Oklahoma, the State's sales tax, measured by the full purchase price of the ticket, violated the Commerce Clause. The courts' error stems from a misunderstanding and mischaracterization of the taxable transaction at issue—the sale. This mischaracterization led the courts below to shift their focus and constitutional analysis away from the activity actually being taxed, the *sale* of transportation, to the transportation itself.

Contrary to the opinions below, the State's sales tax is not upon the purchaser's ultimate use or enjoyment of the thing purchased, nor upon the vendor's income or receipts for the providing of it. In arriving at a contrary conclusion, the courts below misconstrued the state statutes themselves, and ignored the Oklahoma Supreme Court's construction thereof.

In reaching their conclusions, the courts below relied upon a 1948 decision that is totally inapposite to the case at bar—both as to the type of tax involved and the nature of the activity taxed—and completely disregarded the applicable decisions of this Court which have upheld the states' power to tax a discrete transaction which occurs solely within the state's borders.

When seen for what it truly is, Oklahoma's tax here is a "garden-variety" sales tax imposed upon the in-state



purchaser as a result of a discrete, unijurisdictional event which no other state can tax. The tax clearly does not discriminate against interstate commerce, nor can it subject the purchaser to multiple taxation, and is legally indistinguishable from similar sales taxes previously upheld by this Court. The decisions below should be reversed.

## ARGUMENT

### OKLAHOMA'S SALES TAX ON THE IN-STATE PURCHASE OF TRANSPORTATION BY BUS, MEASURED BY THE FULL PURCHASE PRICE OF THE TICKET, IS COMPLETELY CONSONANT WITH ALL FOUR PRONGS OF THE *COMPLETE AUTO* TEST AND IS CONSTITUTIONALLY PERMISSIBLE, REGARDLESS OF THE PURCHASER'S ULTIMATE DESTINATION.

The United States Constitution provides that "Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes. . . ." U.S. Const. art. I, § 8, cl. 3. But, in imposing taxes for state purposes, a state is not exercising any power which the Constitution has conferred upon Congress. It is only when the tax operates to regulate commerce between the states to an extent which infringes the authority conferred upon Congress that the tax can be said to exceed constitutional limitations. *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U.S. 33, 45 (1940).

It is well settled that the purpose of the Commerce Clause is not to relieve those engaged in interstate commerce from their just share of state tax burdens. *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250, 254 (1940).

An incidental increase in the cost of doing business as a result of the tax is not sufficient cause to find the tax infringes on the Commerce Clause. *Id.* Where the tax is imposed only on a local activity, and does not aim at or discriminate against interstate commerce, the fact that interstate commerce may occur in connection with or because of the taxed event does not render the tax unconstitutional. *McGoldrick*, 309 U.S. at 48–50.

In *Complete Auto Transit Inc. v. Brady*, 430 U.S. 274 (1977), this Court set forth the test for determining whether a state tax improperly impedes Congress' authority to regulate commerce between the states. Under the four-prong test of *Complete Auto*, a state tax is constitutional if the tax: (1) is applied to an activity with a substantial nexus with the taxing state; (2) is fairly apportioned; (3) does not discriminate against interstate commerce; and (4) is fairly related to the services provided by the State. *Id.*, at 279. Oklahoma's tax on the in-state sale of transportation for hire passes all four prongs of the *Complete Auto* test, is compatible with *McGoldrick* and succeeding cases relating to sales taxes, and is not an improper infringement upon the Commerce Clause.

**A. The Activity Here Taxed Is The Sale Within The State By A Vendor Physically Present Therein, Which Satisfies The Nexus Requirement.**

The bankruptcy court correctly determined that the nexus requirement of *Complete Auto* was met. This Court has established a clear test in sales and use tax cases for determining substantial nexus for Commerce Clause purposes. If the taxable sale occurs within the taxing state by a vendor who is physically present therein, the substantial nexus requirement is satisfied. *Quill Corp. v. North Dakota by and through Heitkamp*, 112 S.Ct. 1904, 119 L.Ed.2d 91 (1992); *see also, National Bellas Hess, Inc. v. Department of Revenue of Ill.*, 386 U.S. 753, 87 S.Ct. 1389, 18 L.Ed. 2d 505 (1967); *National Geographic Society v. California Bd. of Equalization*, 430 U.S. 551, 97 S.Ct. 1386, 51 L.Ed.2d 631 (1977). Here, this test is clearly satisfied, it being stipulated that Jefferson is physically present and operating within Oklahoma and that all of the taxes involved here are upon sales made by Jefferson within the State.



**B. The Oklahoma Sales Tax At Issue Is Both Internally And Externally Consistent And Is, Therefore, Fairly Apportioned.**

The central purpose behind the apportionment requirement is to ensure that each State taxes only its fair share of an interstate transaction. *Goldberg v. Sweet*, 488 U.S. 252, 260–61 (1989). To determine whether a tax is fairly apportioned, it must be examined for internal and external consistency. *Id.*, at 261. Oklahoma's sales tax satisfies both of these requirements.

1. ***The Oklahoma sales tax is internally consistent because if each state identically taxed the sale of transportation, no multiple taxation could occur.***

Internal consistency requires a tax be structured so that if every state levied an identical tax, no multiple taxation would result. *Goldberg*, at 261. Oklahoma's sales tax is levied on the consumer at the time a sale of transportation for hire occurs. The tax is imposed only on sales occurring within the state. *Liberty Steel Co. v. Oklahoma Tax Commission*, 554 P.2d 8 (Okla. 1976).

As the bankruptcy court, the district court and the court of appeals all correctly determined, since a bus ticket can be sold in only one state, even if every state were to tax

the sale of bus tickets within its borders, no purchaser would be taxed more than once. Thus, as each of those courts properly held, Oklahoma's sales tax is internally consistent.

2. ***The Oklahoma sales tax is externally consistent because the entire activity being taxed occurs in Oklahoma and the possibility of multiple taxation is nonexistent.***

The lower courts held that Oklahoma's sales tax failed the external consistency requirement of the apportionment prong of *Complete Auto* because the tax is not apportioned according to the miles to be travelled in Oklahoma. In doing so, each of the lower courts relied upon *Central Greyhound Lines, Inc. v. Mealey*, 334 U.S. 653 (1948). That reliance was misplaced.

*Central Greyhound* is totally inapposite to this case, and was wrongly relied upon by the courts below. That case involved an *income* tax on the bus company's gross proceeds or total revenues, while the case at bar involves a *sales tax* on the consumer, *measured by* the amount of the purchase. Central Greyhound conducted bus routes that ran primarily in New York but crossed into New Jersey and Pennsylvania for a short period. New York imposed an income tax on the bus company. The amount of tax due was based on the bus company's gross receipts or total income earned. This Court stated the tax was improper because part of the bus company's income was generated by bus routes occurring outside New York. In essence, New York was attempting to collect income tax on income generated outside the state. This case, however, involves a sales tax on the consumer—not an income tax on the bus company. Jefferson's revenues, whether generated in Oklahoma or otherwise, are not involved in this case, nor are they here sought to be taxed. Oklahoma



requires only that Jefferson *collect* a *sales tax* from its Oklahoma consumer. Jefferson became liable only because it failed to do so.

*Central Greyhound* provides no guidance for this case. The lower courts' reliance on that case stems from a misunderstanding and mischaracterization of the nature of the taxes in question and the activity being taxed. In *Central Greyhound* the tax was levied on the service provider's income, and the taxed activity was the production of that income. However, notwithstanding the court of appeals' refusal below to accept the well-recognized distinction between the sale of a thing and the thing itself, Oklahoma's sales tax is neither a tax on property (the thing purchased) nor a tax on income. *Oklahoma Tax Commission v. Sisters of The Sorrowful Mother*, 97 P.2d 888, 892 (Okla. 1940). The taxable event is the sale itself. *Liberty Steel, supra*, 554 P.2d at 10. Unlike the gross income tax in *Central Greyhound*, levied on the company's revenues from activities conducted in other states, Oklahoma's sales tax is levied on the consumer, and is imposed solely with respect to that consumer's activity *within* the State. *Id.*

Nor, contrary to the district court's suggestion, is there any real potential for multiple taxation. That court assumed the possibility of double taxation existed because, while Oklahoma taxes the consumer at the point of sale, other states could impose an income tax on Jefferson's revenues from transporting its passengers through those states. Thus, according to the district court, if Jefferson passed those taxes on to its customers by increasing the price of its ticket, the purchaser would "effectively" be taxed twice for the trip. The flaw is this reasoning is obvious: First, in order for multiple taxation to occur, the incidence of both taxes must fall on the same taxpayer.

However, it is well established that a tax directly upon a supplier or vendor, even though the burden of the tax is indirectly passed on to the consumer by including its cost in the purchase price, does not amount to an imposition of the tax on the purchaser. *See, e.g., Liggett & Myers Tobacco Co. v. United States*, 299 U.S. 383, 386 (1937). Further, taken to its logical conclusion, the district court's holding would result in a scenario wherein if any state imposes an income tax on a company engaged in interstate transactions, no additional tax of any type could be imposed by any other state upon anyone dealing with that business. Such is clearly not the law. This Court has consistently held that interstate commerce may be made to pay its fair share even if it increases the cost of doing business. *Western Live Stock, supra*. In addition, it is the consumer here that is being taxed, and that consumer is not subject to multiple taxation. Even the district court acknowledged that no other state has sufficient nexus to tax the consumer. J.A. 22.

The opinions below conflict with the applicable decisions of the Oklahoma Supreme Court and of this Court, which have upheld the states' power to tax a discrete transaction which occurs solely within the State's borders. For example, in *Koch Fuels v. State ex rel. Tax Comm'n*, 862 P.2d 471 (Okla. 1993), the Oklahoma Supreme Court analyzed Oklahoma's sales tax under the *Complete Auto* test in the face of a Commerce Clause challenge raising many the same arguments as made here, and, insofar as pertinent hereto,[3] found those statutes constitutional. The

[3] The Oklahoma court did find that a statutory exemption from sales tax on goods manufactured in Oklahoma and transported to another state discriminated against interstate commerce, and vacated the tax assessment for that reason, in (continued...)



well-reasoned opinion of the Oklahoma Court studiously follows, and is completely consistent with, the applicable pronouncements of this Court. *Koch Fuel* involved the sale of fuel oil, with the contract between the parties designating Tulsa, Oklahoma as the point of delivery of the fuel. The fuel was actually delivered outside the State of Oklahoma at various points along an interstate pipeline. The Oklahoma Court reasoned that because a sale is an insular and discrete transaction that can occur only in one place, the sale is taxable only by the state in which it occurs. Further, the court said:

> The sales tax here does not arise because oil is being transported through [or outside] the state, but because Koch sold oil to Burlington Northern in Oklahoma. * * * " The fact that a product has travelled or will travel in interstate commerce does not preclude a tax being levied at the time of its sale." L. Tribe, *American Constitutional Law*, 446 (2d ed. 1988). *See State Tax Commission v. Pacific States Cast Iron Pipe Co.*, [372 U.S. 605 (1963)], and our opinion in *Liberty Steel Company v. Oklahoma Tax Commission*, 554 P.2d 8, 10–11 (Okla. 1976). * * * The fact that Burlington Northern [the purchaser] consumed the oil outside of Oklahoma does not immunize from taxation Koch's sale to Burlington Northern within this State.

*Id.*, 862 P.2d at 478.

[3](...continued)
that case only. That element is not present in the case before this Court. Further, having struck down that particular exemption, the court ruled that, thereafter, there was and would be no constitutional impediment to imposition of the tax in the same type of case. 862 P.2d at 481.

Likewise, this Court has traditionally viewed local sales taxes favorably in the face of Commerce Clause challenges. In *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U.S. 33 (1940), the tax at issue was a New York City sales tax imposed on the sale of goods. New York City levied a tax on the consumer that was collected by the retailer at the time of the sale. In *McGoldrick*, a Pennsylvania corporation maintaining a sales office in New York entered into a contract with a New York buyer for the sale of coal. The coal was mined in Pennsylvania and shipped to New York through channels of interstate commerce. The coal was not shipped until the parties entered into the sales contract. The seller challenged the New York City sales tax, alleging it infringed upon the Commerce Clause due to the fact the goods were shipped through interstate commerce following the sale. This Court held the New York City sales tax valid because the practical effect of the tax did not subject interstate commerce to a greater burden, or to the danger of a greater burden, than would result if no interstate commerce were involved. *Id.*, at 54, 57–58.

The economic effect of Oklahoma's sales tax is identical to the economic effect of the New York City sales tax in *McGoldrick*. Regardless of the subsequent interstate bus route, it is the *sale* of transportation which creates the taxable transaction. The sale of transportation occurs solely in Oklahoma. This Court has stated that the *taxable transaction* determines if a state tax improperly infringes the Commerce Clause. *Colonial Pipeline Co. v. Traigle*, 421 U.S. 100. Oklahoma's sales tax is levied on the *sale* of transportation and not on the interstate bus route; for that reason, it passes external consistency.

In *Goldberg* the State of Illinois imposed a 5% tax on intrastate telecommunications and also on interstate



telecommunications originating or terminating in the state and charged to an Illinois service address, regardless of where the telephone call was billed or paid.

In upholding the Illinois tax under the four-prong test of *Complete Auto*, the Court held that the tax was internally consistent for apportionment purposes, because "if every State taxed only those interstate phone calls which are charged to an in-state service address, only one state would tax each interstate call." *Id.*, 488 U.S. at 261. Here, the same holds true. If every state levied a tax on the sale of bus tickets within the state, only one state could tax each sale. *See, also, Koch Fuels*, 862 P.2d at 479.

As to external consistency, the Court likewise upheld the tax, rejecting the argument that a tax on the gross charge was not fairly apportioned and could likely result in multiple taxation, saying:

> The Director argues that, *because the Tax Act has the same economic effect as a sales tax*, it can be based on the gross charge of the telephone call. *See, e.g., McGoldrick v. Berwind-White Coal Mining Co.*, 309 U.S. 33, 58 (1940) (sales tax); cf. *D. H. Holmes Co. v. McNamara*, 486 U.S. 24, 31–32 (1988) (use tax); *Tyler Pipe Industries, Inc. v. Washington Dept. of Revenue*, 483 U.S. 232, 251 (1987) (gross receipts).
>
> We believe that the Director has the better of this argument. *The tax at issue has many of the characteristics of a sales tax.* It is assessed on the individual consumer, collected by the retailer, and accompanies the retail purchase of an interstate telephone call. Even though such a retail purchase is not a purely local event since it triggers simultaneous activity in several States, cf. *McGoldrick, supra*, at 58, the Tax

> Act reasonably reflects the way that consumers purchase interstate telephone calls.

*Goldberg*, 488 U.S. at 262. [Emphasis added.]

Because of the structure of the Illinois tax statute, which levied the tax without regard to where a call is billed or paid, the Court reasoned that two states—but only two—could tax the same call: the state in which the customer's service address is located and the state where the call is billed or paid. The Court then held that "[t]his limited possibility of multiple taxation, however, is not sufficient to invalidate the Illinois statutory scheme." *Id.*, at 263–64. The Court in *Goldberg* did observe that to the extent that some other state *might* tax the same call, Illinois' credit provision operated to avoid multiple taxation. *Id.*, at 264, 109 S.Ct. at 590. However, nowhere in *Goldberg* did the Court say that *only* a taxing scheme that provided for such credits could survive the test of constitutionality. It is axiomatic that where there is *no* possibility of multiple taxation, there is no need for credit provisions. *See, Koch Fuels*, 862 P.2d at 478–479.

The tax at issue here does not merely have "many of the *characteristics* of a sales tax," it *is* a sales tax. It is applied to a retail purchase that is a purely local event. Differing from—and more localized than—the telephone calls in *Goldberg*, the purchase of a bus ticket in Oklahoma does not trigger simultaneous activity in several states, or even in one other state. Here the sale is complete, and taxable, before any transportation of any kind occurs—*or even if no transportation occurs at all.* Travel is not the taxed activity. A bus ticket need not be used for its sale to be taxable.

In like vein, this Court has approved, for Commerce Clause purposes, state sales taxes on sales of goods



subsequently used solely in interstate or foreign commerce. In *Wardair Canada, Inc. v. Florida Dept. of Revenue*, 477 U.S. 1 (1986), Florida imposed a state sales tax on all aviation fuel sold within the state. The jet fuel was used in intrastate, interstate and foreign transportation. There, the Court accepted that the sale of fuel was a discrete transaction that could occur in only one location, that no threat of multiple taxation could exist, and that the tax did not contravene the Commerce Clause. *Id.*, at 8–9.

In *Itel Containers International Corporation v. Huddleston*, 507 U.S. ______, 113 S.Ct. 1095 (1993), Tennessee levied a sales tax on the lease in Tennessee of cargo containers which were used solely in foreign commerce. The Court upheld the Tennessee Supreme Court's finding that the state sales tax clearly met the *Complete Auto* four-prong test. 113 S.Ct. at 1104. The Court found the Tennessee sales tax to be "a fair measure of the state's contacts with a given commercial transaction in all four aspects of the *Complete Auto* test." *Ibid.* Justice Scalia, in his concurring opinion, stated the Tennessee tax to be "nothing more than a garden-variety sales tax that clearly does not discriminate against foreign [or interstate] commerce." *Id.*, at 1107 (Scalia, J., concurring).

The Oklahoma sales tax is a "garden-variety" sales tax: It is assessed on the individual consumer, collected by the retailer, accompanies the retail purchase of a bus ticket, and reasonably reflects the way that consumers purchase bus tickets—in a single, discrete event—all as recognized and upheld in *McGoldrick, Goldberg, Itel Containers, Wardair* and *Koch Fuels.* The tax reasonably reflects the in-state component of the activity being taxed, and offers no threat of multiple taxation. The lower courts' finding to the contrary, based upon a mischaracterization of the

tax as one on interstate transportation or use *after the sale*, is contrary to the applicable decisions of this Court, and should be reversed.

### C. The Oklahoma Sales Tax Does Not Discriminate Against Interstate Commerce.

A tax may be impermissible under the Commerce Clause if it is "facially discriminatory, has a discriminatory intent or has the effect of unduly burdening interstate commerce." *Amerada Hess Corp. v. Director, Div. of Taxation*, 490 U.S. 66, 75–79 (1989).

The only court below to address the third prong of *Complete auto*, the bankruptcy court, correctly found that Oklahoma's sales tax is not facially discriminatory, nor was it enacted with any discriminatory intent. It is levied and applied equally at the same rate to all sales of transportation for hire by all common carriers. There is neither the intent nor the effect of conferring a benefit upon local industry or local residents at the expense of interstate commerce or nonresidents.

Nevertheless, the bankruptcy court found the tax discriminatory because, in the court's words, "in failing the apportionment part of the *Complete Auto Transit* test, the Oklahoma tax discriminates against interstate commerce." J.A. 15. That, however, is not the test. Rather, the inquiry is whether the practical effect of the tax is to subject interstate commerce to a greater burden than would result if no interstate commerce were involved. *McGoldrick*, 309 U.S. at 54, 57–58. As the purely local sales tax in *McGoldrick* did not do so, neither does it here. Discrimination here would occur only if bus tickets involving solely intrastate travel were exempted from the tax or taxed at a lower rate, and such is not the case.



### D. The Oklahoma Sales Tax Is Fairly Related To Services Provided By The State.

The fourth part of the *Complete Auto* test requires that the tax be fairly related to the presence and activities of the taxpayer within the State. *Goldberg*, 488 U.S. at 266. This part "focuses on the wide range of benefits provided to the taxpayer, not just the precise activity connected to the interstate activity at issue." *Id.* at 267. In *D. H. Holmes Co. v. McNamara*, 486 U.S. 24, 32 (1988), the Court noted that a taxpayer's receipt of police and fire protection, the use of public roads and mass transit, and the other advantages of civilized society satisfied the requirement that the tax be fairly related to benefits provided by the State to the taxpayer. In this case, both Jefferson and its customers, the true taxpayers, receive police and fire protection, along with other public services, at the locations where Jefferson sells tickets and loads its buses. Jefferson and its customers also receive benefit from police protection and public road maintenance on Jefferson's Oklahoma routes. As the bankruptcy court correctly found, the Oklahoma tax is fairly related to the services provided by Oklahoma.

## CONCLUSION

The Oklahoma sales tax at issue, which taxes a single discrete transaction within the State, is directly related to Jefferson and its taxed customers' activities within the State; it is fairly apportioned; it does not discriminate against interstate commerce; and it is fairly related to services provided by Oklahoma. The Oklahoma tax thus satisfies all four parts of the *Complete Auto* test and is constitutionally permissible.

**The decision below should be reversed, and this cause should be remanded with instructions to allow and direct the payment of Oklahoma's claims for unpaid sales taxes.**

**Respectfully submitted,**

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(6)



No. 93-1677

In the
# Supreme Court of the United States
October Term, 1994

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STATE OF OKLAHOMA, EX REL.
OKLAHOMA TAX COMMISSION,

*Petitioner,*

v.

JEFFERSON LINES, INC.,

*Respondent.*

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ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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## BRIEF ON THE MERITS FOR THE RESPONDENT JEFFERSON LINES, INC.

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## QUESTION PRESENTED

Does the sales tax imposed by Oklahoma Statutes Title 68, Section 1354(1)(C) exact an unfair portion of the proceeds of interstate commerce by levying a tax on the entire gross receipts of transportation for hire without regard to the fact that a substantial portion of such transportation is furnished outside Oklahoma?

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No. 93-1677

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1994

STATE OF OKLAHOMA, EX REL.
OKLAHOMA TAX COMMISSION, PETITIONER

*v.*

JEFFERSON LINES, INC., RESPONDENT

On Writ of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

BRIEF ON THE MERITS FOR THE RESPONDENT
JEFFERSON LINES, INC.

## OPINIONS BELOW

The opinions below are adequately set forth in the Brief for the Petitioner ("Petitioner's Brief") and are appended to the Petitioner's Appendix.

## JURISDICTION

The jurisdictional requisites are adequately set forth in the Petitioner's Brief.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Commerce Clause of the United States Constitution, Article I, Section 8, Clause 3, provides:

The Congress shall have Power . . .

* * * *

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . .

Pertinent sections of the Oklahoma Sales Tax Statutes ("Taxing Statute") are as follows:

OKLA. STAT. tit. 68, § 1354(1)(C) (Supp. 1988):

There is hereby levied upon all sales, not otherwise exempted in the Oklahoma Sales Tax Code, an excise tax of



four percent (4%) of the gross receipts or gross proceeds of each sale of the following:

* * * *

(C) Transportation for hire to persons by common carriers, including railroads both steam and electric, motor transportation companies, taxicab companies, pullman car companies, airlines, and other means of transportation for hire . . .[1]

OKLA. STAT. tit. 68, § 1352(F) (Supp. 1988) defines "gross receipts" or "gross proceeds" as "the total amount of consideration for the sale of any tangible personal property or service taxable under this article, whether the consideration is in money or otherwise . . ."

OKLA. STAT. tit. 68, § 1352(L)(4) (Supp. 1989) provides that, for purposes of Chapter 68:

> 'Sale' means the transfer of either title or possession of tangible personal property for a valuable consideration regardless of the manner, method, instrumentality, or device by which the transfer is accomplished in this state, or other transactions as provided by this subsection, including but not limited to:
>
> * * * *
>
> (4) The furnishing or rendering of services taxable under this article.
>
> * * * *

[1] The Taxing Statute does not provide a credit against the sales tax for taxes paid to other states with respect to such transportation for hire.

## STATEMENT OF CASE

Respondent Jefferson Lines, Inc. ("Jefferson")[2] was a common carrier providing bus services in Oklahoma as well as numerous other states. In its operation in Oklahoma, Jefferson undertook to furnish both "intrastate" and "interstate" transportation services. "Intrastate transportation" relates to routes which both originate and terminate solely within the State of Oklahoma without crossing any state lines. Conversely, "interstate transportation" relates to: (1) routes which originate in Oklahoma and terminate in a state other than Oklahoma and vice-versa; (2) routes which originate and terminate in Oklahoma but involve travel outside of the State of Oklahoma (i.e. "roundtrip tickets"); and (3) routes which are paid for in the State of Oklahoma for travel that neither originates nor terminates in Oklahoma but necessarily crosses at least one state line.

On October 27, 1989, Jefferson filed its Petition for Voluntary Chapter 11 Bankruptcy with the United States Bankruptcy Court, District of Minnesota. On August 3, 1990, Jefferson's Plan of Reorganization was confirmed. In conjunction with Jefferson's Chapter 11 bankruptcy, the Commission filed various proofs of claim which alleged an obligation for the collection and remittance of certain sales tax in Oklahoma. The Commission claimed that Jefferson should have collected and remitted sales tax on the gross receipts of all sales of bus transportation if the tickets were bought within Oklahoma, whether or not the routes involved substantial

[2] There are no parent companies or subsidiaries which are required to be listed pursuant to Rule 29 of the Rules of the Supreme Court of the United States.



interstate transportation. Jefferson objected to the Commission's proofs of claim.

By Order dated May 13, 1992, the United States Bankruptcy Court, District of Minnesota, sustained Jefferson's objection holding that the Oklahoma sales tax in regard to interstate transportation furnished by Jefferson is not fairly apportioned and discriminates against interstate commerce in violation of the Commerce Clause of the United States Constitution. The Commission appealed. By Order dated December 22, 1992, the United States District Court, District of Minnesota, affirmed the Bankruptcy Court. The District Court reasoned that the Oklahoma sales tax as applied to such interstate transportation establishes a strong potential for multiple taxation and is not reasonably apportioned. The Commission appealed. On January 21, 1994, the Eighth Circuit, in a decision authored by Chief Judge Richard S. Arnold, affirmed the District Court, reasoning that Oklahoma was attempting in this instance to tax gross receipts from the sale of transportation outside its borders by taxing more than the instate component of the interstate activity in violation of the Commerce Clause of the United States Constitution. *See In re Jefferson Lines, Inc.*, 15 F.3d 90 (8th Cir. 1994).

## SUMMARY OF ARGUMENT

As developed below, Oklahoma is seeking in this instance to tax interstate transportation for hire. Therefore, the question before this Court, as it determines the validity of the Commission's claims, is whether in regard to furnishing interstate transportation for hire, the Taxing Statute and the Commission's application of the Taxing Statute violate Article I, Section 8, Clause 3, of the United States Constitution ("Commerce Clause"). After thoughtful and well reasoned

analyses, including the application of the Court's prior decisions, the Bankruptcy Court, the District Court and the Eighth Circuit Court of Appeals have concluded that Oklahoma Statutes Title 68, § 1354(1)(C) imposes a sales tax on interstate transportation for hire, measured by gross receipts therefrom, which is not fairly apportioned or which discriminates against interstate commerce in violation of the Commerce Clause. This Court's decision in *Central Greyhound Lines v. Mealy* mandates invalidation of the Taxing Statute as it relates to interstate bus transportation. Furthermore, the Commission's assertions regarding the taxable activity are contrary to the express language of the Taxing Statute and to this Court's previous decisions involving sales taxes under the Commerce Clause. Finally, the Taxing Statute and the Commission's application thereof fail to meet the test formulated in *Complete Auto Transit Co. v. Brady*. The opinions of the lower courts rest on Commerce Clause decisions reached by this Court. Accordingly, Jefferson respectfully requests this Court to affirm the decision of the Eighth Circuit Court of Appeals.

## ARGUMENT

### A. *CENTRAL GREYHOUND* MANDATES THAT A TAX ON THE ENTIRE GROSS RECEIPTS OF INTERSTATE BUS TRANSPORTATION BE DECLARED INVALID UNDER THE COMMERCE CLAUSE.

This Court has previously addressed the Commerce Clause validity of a tax imposed on the gross receipts from interstate bus transportation. *Central Greyhound Lines v. Mealey*, 334 U.S. 653 (1948). In *Central Greyhound*, this Court invalidated New York's unapportioned tax on the gross receipts from interstate transportation which to a substantial



extent took place outside the taxing state on the basis such transportation could not be deemed legally to take place solely in New York. *Id.* at 660. The Commission's attempt to impose a sales tax on the entire gross receipts of interstate transportation which is furnished outside of Oklahoma is contrary to this Court's decision in *Central Greyhound*, which requires that an unapportioned gross receipts tax on interstate bus transportation be declared invalid. *Id.* The Taxing Statute is indistinguishable from the tax previously held unconstitutional by this Court in *Central Greyhound*. *See* Respondent's Brief pp. 27-28. The fact that *Central Greyhound* was decided prior to *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977) is irrelevant. As demonstrated below, this Court recently endorsed *Central Greyhound* as consistent with *Complete Auto*. This Court recognizes that *stare decisis* has "special force" where, as in this case, "Congress remains free to alter what we have done." *Quill Corp. v. North Dakota*, 504 U.S. ___, 112 S.Ct. 1904, 119 L.Ed.2d 91, 111-112 (1992) (Scalia, J., concurring) citing *Patterson v. McLean Credit Union*, 491 U.S. 164, 172-173 (1989). Jefferson maintains that the demands of *stare decisis* are especially important when considering the reliance interests involved in the realm of commercial activity. Thus, on *stare decisis* grounds alone the Eighth Circuit opinion should be affirmed.

## B. OKLAHOMA STATUTES TITLE 68, SECTION 1354(1)(C), AS IT APPLIES TO INTERSTATE TRANSPORTATION FOR HIRE, IS A TAX ON INTERSTATE COMMERCE THAT MUST WITHSTAND SCRUTINY UNDER THE COMMERCE CLAUSE.

### 1. Interstate Bus Travel Constitutes Interstate Commerce.

The term "interstate commerce" means "commerce between any place in a State and any place in another State, or between places in the same State through another State. . . ." *Central Greyhound*, 334 U.S. at 661. "It is too late in the day to deny" that transportation which leaves a State to enter another State is "Commerce among the several States." *Id.* at 655-56. The Commission hinges its position on the assertion that the Taxing Statute is imposed on a discrete local activity -- the sale of a bus ticket. In so doing, the Commission seeks to "indulge in pure fiction" by characterizing the tax in this case as one on a "discrete local activity," namely the sale of an interstate bus ticket, rather than a sales tax imposed on transportation services that Jefferson renders outside Oklahoma. *Id.* at 660. This Commission's contortion of the taxable event is contrary to the express language of the Taxing Statute. Even if the Taxing Statute did apply to the sale of a bus ticket, however, such a transaction, when it relates to transportation services that are rendered outside of the taxing state, necessarily triggers activity in other states. *Goldberg v. Sweet*, 488 U.S. 252, 262 (1989). The sales tax in this instance is imposed on interstate commerce whether, as the Taxing Statute plainly requires, the taxable event is viewed as the furnishing or rendering of interstate transportation services or, without



regard to such plain requirement, it is characterized to be the sale of a bus ticket for such transportation services.

### 2. The Commission's Attempt To Characterize The Tax As One On The Sale Of A Bus Ticket Is Contrary To The Taxing Statute.

The relevant provision before the Court is Section 1354(1)(C) of the Taxing Statute, which imposes a sales tax of 4% of the "gross receipts" of each "sale" of "transportation for hire."[3] "Gross receipts" is defined at Section 1352(F) of the Taxing Statute to mean the total amount of consideration for the sale of any tangible personal property or service taxable under this article. Thus, the sales tax applies to either the "sale" of tangible personal property or the "sale" of certain enumerated services, including "transportation for hire." Section 1352(L)(4) provides that a "sale" with respect to services means "the furnishing or rendering of services." Accordingly, with respect to the sale of transportation for hire, the Taxing Statute, at Section 1354(1)(C), literally imposes a sales tax of 4% of the gross receipts from the furnishing or

[3] The tax was collected by Oklahoma under Section 1354(1)(C). The lower court decisions determined the relevant statutory provision to be Section 1354(1)(C). Oklahoma has stipulated that Section 1354(1)(C) is the applicable provision, and the Amicus Brief in Support of Petitioner recognizes it as the relevant provision and concedes that transportation for hire is a service for purposes of Oklahoma's sales tax statute. The Commission's unexplained reference to Section 1354(1)(A) in its Brief has no apparent bearing in this case which is concerned solely with transportation for hire. Because the tax imposed under Section 1354(1)(C) is on the **entire gross receipts** of interstate transportation for hire, it is incapable of being apportioned with respect to such transportation, and the Commission's attempt to collect sales tax thereunder must be disallowed in toto.

rendering [the "sale"] of transportation services. The taxable event is therefore not the sale of the ticket for such transportation services as the Commission claims.[4]

State and federal courts that have interpreted the relevant provisions of the Oklahoma Sales Tax Statutes have concluded that with respect to the sale of services, the activity being taxed thereunder is the furnishing or rendering of the services, not payment therefor or the execution of an agreement to acquire such services. *Tad Screen Advertising, Inc. v. Oklahoma Tax Commission*, 126 F.2d 544 (10th Cir. 1942) (adopted by the Oklahoma Supreme Court in *Liberty Steel Co. v. Oklahoma Tax Commission*, 554 P.2d 8, 10-11 (Okla. 1976)); *Pioneer Telephone Cooperative Inc. v. Oklahoma Tax Commission* 832 P.2d 848, 851 (Okla. 1992).

Given the express language of the Taxing Statute, the tax in question may not be properly characterized as a tax on the "sale of" transportation services if that locution means anything more than the "furnishing or rendering of" such services -- it cannot mean the sale of a bus ticket. A tax characterized by the Commission as one on the sale of a bus ticket that is statutorily measured by the gross receipts from the furnishing

[4] Neither the Taxing Statute nor the Commission's own regulation regarding transportation for hire refers to the transaction of "purchasing (or selling) a ticket" for transportation services. Oklahoma Administrative Code 710:65-19-328, Transportation for hire (Reserved at 10 Ok. Reg. 1111, eff. 2-23-93 (emergency); Added at 10 Ok. Reg. 3847, eff. 7-12-93). This regulation acknowledges the "service" nature of transportation for hire in providing exemptions "if transportation services are provided by a tourism service broker or, if the transportation services are provided by funeral establishments for purposes of conducting a funeral." *Id.*



or rendering of transportation services is a tax on the furnishing or rendering of transportation services.[5]

### 3. Under The Taxing Statute And The Commerce Clause, It Is The Furnishing Or Rendering Of The Services That Justifies Imposition Of A Sales Tax On Services.

The Oklahoma Supreme Court has held that for purposes of the Oklahoma sales tax statute, "[t]o be taxable in Oklahoma the sale must be made in Oklahoma." *Liberty Steel*, 554 P.2d 8, 10 (Okla. 1976). In the case of tangible personal property, Section 1352(L) provides that the transfer of title or possession requisite to a "sale" of the property must be in Oklahoma. OKLA. STAT. tit. 68, § 1352(L). In the case of services, Section 1352(L) defines a "sale" to mean ". . . other transactions as provided by this subsection, including but not limited to . . . (4), the furnishing or rendering of services taxable under this article." OKLA. STAT. tit. 68 § 1352(L)(4). On its face, the statute does not expressly state where such activities, in this case the provision of transportation for hire,

[5] The Commission's claim here seeks to dissociate the sale of the ticket from the furnishing of services, while acknowledging that the measure of the tax is the gross receipts from such services. But "[a] tax on sleeping measured by the number of pairs of shoes you have in your closet is a tax on shoes." *Trinova Corp. v. Michigan Dept. of Treasury*, 498 U.S. 358, 374 (1991) (quoting Jenkins, *State Taxation of Interstate Commerce*, 27 Tenn. L. Rev. 239, 242 (1960)). Similarly, Oklahoma cannot assert that the tax on transportation for hire is really a tax on the sale of a bus ticket unless the tax is imposed **because of** the bus ticket. (*Jenkins* at 242.) It is a truism "that a tax on A is not a tax on B unless it is because of B." . . . "[A] tax on eating is not a tax on butter, even though you happen to be eating butter. Of course, if the tax on eating is levied only because you eat butter, then it is a tax on butter." *Id.*

must take place in order for the sale of the services to be "made" within Oklahoma. *Id.*

However, a sales tax that is imposed on transportation services furnished or rendered outside the taxing state is not a tax on a discrete local activity, and necessarily implicates Commerce Clause scrutiny. *Central Greyhound*, 334 U.S. 653 (gross receipts tax imposed on interstate transportation services); *Tad Screen Advertising*, 126 F.2d 544 (upholding prior version of Oklahoma sales tax statute imposed on advertising services performed within Oklahoma on the grounds that the taxable event was the furnishing of primary services within Oklahoma); *Ragland v. Allen Transformer Co.*, 740 S.W.2d 133 (Ark. 1987), cert. denied, 486 U.S. 1007 (1988); *Corning Laboratories, Inc. v. Iowa State Dept. of Revenue*, 270 N.W.2d 463 (Iowa 1978); *LeTourneau Sales & Service, Inc. v. Olsen*, 691 S.W.2d 531 (Tenn. 1985)[6].

In *Tad Screen Advertising*, the court upheld the imposition of Oklahoma's sales tax on the sale of advertising services under the Commerce Clause. 126 F.2d 544. The contract for the purchase of the services was made in Texas.[7]

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[6] We address herein only the constitutional question of whether the tax attempted to be imposed on Jefferson by the State of Oklahoma violates the Commerce Clause. Of course, if the furnishing or rendering of services outside of Oklahoma is not a "sale" of services within the meaning of the Taxing Statute the sales tax could not be imposed on such transportation services under the internal laws of the State.

[7] Although negotiations, countersignatures and various approvals typically involved activities in several states, the contracts were approved and countersigned by the taxpayer in Texas. *Tad Screen Advertising*, 126 F.2d at 546. Where such negotiations, approvals and signings occur is irrelevant for Commerce Clause purposes. It also appears, at least in the



The taxpayer rendered other services outside of Oklahoma in addition to advertising services within Oklahoma. *Id.* at 548-549. However, the court found such outstate services to be incidental, and held that Oklahoma's sales tax on the furnishing or rendering of advertising services did not violate the Commerce Clause because the "taxable event" for Commerce Clause purposes (the relevant local event) was the furnishing of the primary services in Oklahoma. *Id.* at 548. These were the services that constituted the "object" of the contract. *Id.*

Several state courts have addressed the issues raised under the Commerce Clause by the imposition of sales taxes on the sale of services. Each of these decisions is consistent with *Tad Screen Advertising*. In *Ragland v. Allen Transformer Co.*, the Arkansas Supreme Court held that the "taxable event" under Arkansas' sales tax on services was "the rendering of services within the state," and upheld the tax imposed on repair services rendered in Arkansas on goods shipped to outstate customers. 740 S.W.2d 133 (Ark. 1987), cert. denied, 486 U.S. 1007 (1988). In *LeTourneau Sales & Service*, the Tennessee Supreme Court upheld the Tennessee sales tax on repair services performed entirely within Tennessee relating to goods shipped outstate, because the "taxable event" was the rendering of services within Tennessee. 691 S.W.2d at 536. In *Corning Laboratories, Inc.*, the Iowa Supreme Court upheld the Iowa sales tax imposed on testing services performed in Iowa, stating

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case of the sale of tangible personal property, to be irrelevant under the Taxing Statute. *See* OKLA. STAT. tit. 68 § 1352(L)(4) ("regardless of the manner, method, instrumentality or device by which the transfer is accomplished."). The Commission has also recognized this, at least with respect to the sale of tangible personal property, in its regulations. Administrative Rules of the Oklahoma Tax Commission March 10, 1989, Rule 13.011.01:B.3, Interstate Commerce (place at which contract is negotiated and executed is immaterial).

"[t]here is no other state which has any relation, however remote, to those services." 270 N.W.2d at 465. Similar decisions were reached in *Fisher-Stevens, Inc. v. Director, Div. of Taxation*, 121 N.J. Super. 513, 298 A.2d 77 (App. Div. 1972) (New Jersey sales tax imposed on advertising services); *Airwork Serv. Div. v. Director*, 2 N.J. Tax 329, *aff'd*, 4 N.J. Tax 532 (1982), *aff'd*, 97 N.J. 290, 478 A.2d 729, *cert. denied*, 471 U.S. 1127 (1985) (New Jersey sales tax imposed on airplane repair services). Although the *Airwork* court was not specifically applying its Commerce Clause analysis, it stated that "[w]hen the performance of an activity is subjected to a sales tax, the place of performance determines the place of taxation." 2 N.J. Tax at 345. The holdings in these cases relate to the validity of sales taxes under the Commerce Clause, and cannot be regarded simply as statutory interpretations determining the location of the sale within the meaning of the given taxing statute.

These state court decisions all (with the exception of the New Jersey decisions) cite and rely on this Court's decisions in *Evco v. Jones*, 409 U.S. 91 (1972) and *Dept. of Treasury v. Ingram-Richardson Mfg. Co. of Indiana, Inc.*, 313 U.S. 252 (1941), addressing the Commerce Clause implications of two separate gross receipts taxes imposed on the sales of goods or services.

In *Ingram-Richardson*, the Court upheld an Indiana gross income (receipts) tax imposed on enameling services performed entirely within Indiana. *Ingram-Richardson*, 313 U.S. 252. The Court agreed with the lower court that the receipts in question were derived from the sale of services rather than from the sale of goods. *Id.* at 254. The Court held that "[t]he fact that the orders for the enameling were obtained by respondent's agents and contracts were executed outside



Indiana did not make the enameling process other than an intrastate activity and any the less a proper subject for the application of the taxing statute." *Id.* The performance of services, not the execution of the agreement regarding the services, was the relevant intrastate activity for purposes of the Commerce Clause analysis. *Id.*

In *Evco*, the Court considered a New Mexico gross receipts tax imposed on total proceeds received from the sale of "reproducible originals" of books, films, and magnetic audio tapes. *Evco*, 409 U.S. at 91. The reproducible originals were created in New Mexico. *Id.* The contracts relating to the purchase of the reproducible originals were negotiated and executed outside New Mexico, and the reproducible originals were delivered outside New Mexico to the taxpayer's customers. *Id.* The *Evco* Court cited its decision in *Ingram-Richardson Mfg. Co.* as authority for the proposition that "a State may tax the proceeds from services performed in the taxing State, even though they are sold to purchasers in another state", finding irrelevant the fact that the sales were made to out-of-state customers. *Evco*, 409 U.S. at 93. However, the *Evco* Court accepted the lower court's finding that the sales in question were of tangible personal property, rather than of services, because "the reproducible originals [not the performance of the services] were the *sine qua non* of the contract." *Id.* at 94 (Emphasis Added). The Court then held the New Mexico tax invalid because it was imposed on tangible personal property sold (*i.e.* delivered) outside of New Mexico. *Id.*

*Ingram-Richardson* and *Evco v. Jones* are consistent with a long line of decisions reached by this Court that focus (as did the Court of Appeals hereinbelow) on the **practical effect** of a sales or gross receipts tax for Commerce Clause purposes.

But *Ingram-Richardson* and *Evco v. Jones* are significant for two other reasons. First, they establish that the Court will look to what the purchaser and seller of goods or services regard as the thing being purchased (the *sine qua non*) in determining the proper subject of the tax. Second, they establish that in the case of the sale of services, the proper subject of the tax for purposes of the Commerce Clause is the furnishing or rendering of such services.[8]

*Evco*, *Ingram-Richardson*, *Tad Screen Advertising*, and the state court decisions discussed above make clear that, for Commerce Clause purposes, the local activity to which a sales tax on services must relate is the furnishing or rendering of those services, not the execution of an agreement to purchase (or payment for) said services. Under the Commerce Clause, the treatment of a sales tax imposed on services is thus parallel to this Court's treatment of a sales tax imposed on the sale of goods. In the latter case, the delivery of the goods, not the execution of the purchase agreement nor the payment, is the relevant local activity, to determine the proper subject of the tax. *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U.S. 33 (1940) (upheld New York sales tax imposed on sale of goods delivered within the state; delivery was the local activity justifying imposition of the tax; Court did not address the two instances where the delivery was made outside of the taxing state); *McLeod v. J.E. Dilworth Co.*, 322 U.S. 327, 330 (1944) (invalidated Arkansas sales tax imposed on goods delivered to common carrier outside of Arkansas because "the sale - the transfer of ownership - was made in Tennessee"). *Evco v. Jones*, *Ingram-Richardson*, and cases cited by the Commission

[8] *See Tad Screen Advertising*, discussed above, where the court recognized that the rendering of advertising services was the "object" sought by the purchaser.



such as *Itel Containers v. Huddleston*, 507 U.S. ____, 113 S.Ct. 1095, 122 L.Ed.2d 421 (1993) and *Koch Fuels v. State ex rel Tax Commission*, 862 P.2d 471, 474, 476 (Okla. 1993) (court held the delivery, and thus the sale, of fuel oil occurred in Oklahoma, even though it was "extracted", "withdraw[n]", or "pulled" from the pipeline outside Oklahoma), are consistent with *McGoldrick* and *Dilworth*. A sales tax may be imposed on the delivery of goods or the performance of services within the taxing state, but it is invalid under the Commerce Clause if it is imposed merely on the execution of the agreement and payment thereof to acquire such goods or the services.[9]

[9] Oklahoma's assertion that the tax in question applies to a "local activity" regardless of where the transportation services are in fact performed is also contrary to the thought expressed in footnote 2 of *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), a decision wherein the Court examined a tax it denominated as a Mississippi sales tax on transportation services. Although the Court assumed *arguendo* that the transportation services in question required scrutiny under the Commerce Clause (see footnote 4 of *Complete Auto*), the Court recognized that the Mississippi tax was imposed only upon activity which was arguably intrastate, because the transportation services were performed within Mississippi: "the tax has been applied only to commercial transactions in which **a distinct service is performed and payment made** for transportation from one point **within the State** to another point **within the State**" (Emphasis Added). *Id.* at 275, n.2. The place where the transportation services were performed was the factor considered by the Court when addressing whether the activity taxed was a local activity or interstate commerce.

The Commission argues that the relevant local activity taxed here was the "purchase" of the bus ticket from Jefferson or purchasing the transportation services:

> The tax is imposed upon the sale itself, not upon the thing purchased nor upon anyone's occupation or income; and it is imposed only when the sale occurs within the State. The taxable event is complete when the *sale* is made -- in this case, when the bus ticket is bought and paid for.

Petitioner's Brief at 8. But as set forth above, the "sale" under the statute **is** the "furnishing or rendering of services." In order for the tax to be "imposed only when the sale occurs within the state," the services must be furnished or rendered within the State. In the case of transportation for hire, the transportation (not the "purchase" of the ticket) must be furnished or rendered within Oklahoma. The tax in this case is necessarily a tax on services (the thing purchased) and may not be sustained on the basis that the bus ticket was "bought and paid for" in Oklahoma.

This is not a "garden-variety" sales tax imposed as a result of a "unijurisdictional event" which no other State can tax. Petitioner's Brief at 8-9. This was recognized by the Eighth Circuit when it stated, "[w]e will not separate the sale of a piece of paper from the **service** which it represents. To hold otherwise would elevate form over substance and require this Court to ignore economic realities." *Jefferson Lines*, 15 F.3d at 92. (Emphasis Added). The Commission's position is not consistent with the express language of the Taxing Statute and the decisions referred to herein which demonstrate that Section 1354(1)(C) is not a tax on a sale of transportation or a bus ticket -- it is a tax on the furnishing or rendering of



transportation for hire. Transportation services rendered outside Oklahoma cannot be taxed under Section 1354(1)(C).

## C. OKLAHOMA STATUTES TITLE 68 SECTION 1354(1)(C), AS IT APPLIES TO INTERSTATE TRANSPORTATION FOR HIRE, BURDENS INTERSTATE COMMERCE BECAUSE IT FAILS TO SATISFY THE FOUR-PRONG TEST OF *COMPLETE AUTO.*

### 1. The Commerce Clause And *Complete Auto.*

The Commerce Clause of the Constitution Art. I, Section 8, Clause 3, provides that Congress shall have the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." Even where Congress has not acted affirmatively to protect interstate commerce, the Clause prevents States from discriminating against that commerce. *D.H. Holmes, Co., Ltd. v. McNamara*, 486 U.S. 24, 29 (1988); *Associated Industries v. Lohman*, ____ U.S. ____, 114 S.Ct. 1815, 128 L.Ed.2d 639 (1994); *Quill Corp.*, 504 U.S. ___, 112 S.Ct. 1904, 119 L.Ed.2d 91, 104 (1992). The Court has examined the validity of numerous state tax statutes under the Commerce Clause.

After years of wavering doctrinal lines, this Court in *Complete Auto* made it clear that a state tax which taxes interstate commerce can be upheld as not violating the Commerce Clause:

> when the tax is [1] applied to an activity with a substantial nexus with the taxing state, [2] is fairly apportioned, [3] does not discriminate against interstate commerce, and [4] is fairly related to the services provided by the state.

*Complete Auto*, 430 U.S. 274, 278 (1977); *see also*, *Quill*, 504 U.S. ____, 112 S.Ct., ___, 119 L.Ed.2d 91 (1992). *Complete Auto* and subsequent decisions have held that the test is not whether the tax is on interstate commerce, but whether a tax produces a forbidden effect on such commerce. *Complete Auto*, 430 U.S. at 288.

In order to survive a Commerce Clause challenge, a state taxing statute must satisfy each prong of the *Complete Auto* four-prong test. *Goldberg*, 488 U.S. at 260-268. The Eighth Circuit and District Court below examined only the "fair apportionment" prong. Jefferson maintains that the Oklahoma Taxing Statute and the Commission's application thereof to the interstate transportation in question fails to satisfy any of *Complete Auto's* prongs. Because the tax upon which the Commission's claims are based is violative of the Commerce Clause, the Commission's claim should be disallowed in total.



**2. Lack Of Substantial Nexus: The Receipt Of And Payment For An Interstate Bus Ticket Within Oklahoma Does Not Provide Substantial Nexus Between Oklahoma And That Portion Of The Interstate Travel That Occurs Outside Oklahoma.**

*Complete Auto* requires that the tax be "applied to an activity with a substantial nexus with the taxing state." *Quill*, 504 U.S. ___, 112 S.Ct. ___, 119 L.Ed.2d at 107. The "minimum contact" found to be sufficient under a Due Process nexus analysis is not sufficient to satisfy the "substantial nexus" required under the Commerce Clause. *Id.*

To withstand Commerce Clause scrutiny, a relationship must exist between the **activity taxed** and the services provided by the taxing authority and that relationship must be **substantial**. *Id.* at 107. The Taxing Statute must fall unless there is a substantial nexus between that portion of the interstate transportation which occurs outside of Oklahoma, the activity which Oklahoma seeks to tax, and the State of Oklahoma. This is not the case.

The Commission relies on *National Geographic Society v. California Bd. of Equalization*, 430 U.S. 551 (1977) to assert that the substantial nexus prong is satisfied. The Commission points to the totality of Jefferson's activities within the state, including Jefferson's "sale" of tickets within Oklahoma. The Commission's reliance on Jefferson's contacts and *National Geographic*, however, is misplaced, because it fails to address the relationship between (or absence thereof) the **activity** being taxed (that portion of interstate travel that occurs outside Oklahoma) and Oklahoma.

As established above, the activity being taxed is the furnishing or rendering of transportation services. With regard to transportation services rendered outside Oklahoma, the only relationship between that activity and Oklahoma is that Oklahoma is the place where the ticket is delivered and payment is made. Furthermore, unlike the case in *Goldberg*, the "thing being purchased" is not limited to residents of the taxing state.[10]

The Commission cannot, in **all** taxable situations covered by the Taxing Statute, demonstrate a substantial nexus between the activity being taxed and Oklahoma. This is perhaps best evidenced by an example where a ticket is delivered in Oklahoma and all of the transportation services are rendered outside Oklahoma (e.g., a roundtrip ticket issued in Oklahoma for bus travel between Caney, Kansas and Minneapolis, Minnesota). Oklahoma would lack substantial nexus with the transportation service rendered in Kansas, Minnesota and the points in between. Yet the Taxing Statute is sufficiently broad to tax the entire gross receipts from those services as if all of the services were performed in Oklahoma.

The delivery of and payment for a bus ticket in Oklahoma establishes some minimal nexus with Oklahoma.

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[10] For example, if a bus ticket was purchased via an interstate telephone call to Bartlesville, Oklahoma by a resident of Caney, Kansas for travel between Caney, Kansas and Minneapolis, Minnesota, the taxpayer's sole contact with the State of Oklahoma would be through interstate activity. This Court has previously held that a vendor is free from the duties to collect sales and use taxes imposed by a State when its only connection with the taxing state is through some form of interstate activity (common carrier, U.S. mail). *Quill*, 504 U.S. at ___, 112 S.Ct. at ___, 119 L.Ed.2d at 108; see also *National Bellas Hess Inc. v. Dept. of Revenue of Ill.*, 386 U.S. 753 (1967).



However, such nexus is insufficient to satisfy the substantial nexus required under the Commerce Clause.

**3. The Taxing Statute Is Not Fairly Apportioned: The Taxing Statute Is Not Fairly Apportioned Because It Subjects Interstate Commerce To Multiple Taxation And Enables Oklahoma To Exact A Tax On Activities To Which Oklahoma Bears No Special Relation Or Confers Any Proportionate Benefit.**

It is undisputed that the Taxing Statute is unapportioned. While not constitutionally invalid per se, an unapportioned tax is constitutionally suspect because of the risk of multiple taxation. The requirement of apportionment is significant principally because it helps to insure that the tax will avoid the constitutional pitfalls of multiple taxation, or the risk of such taxation, and discrimination. *Container Corp. of America v. Franchise Tax Board*, 463 U.S. 159, 170-71 (1983). The fact that a tax is unapportioned is constitutionally insignificant **only if** the tax can avoid the pitfalls of multiple taxation and discrimination. This Court examines the tax for **internal** and **external** consistency to determine whether it is fairly apportioned. *Goldberg* 488 U.S. at 361. Internal consistency addresses the threat of multiple taxation caused by another state's adoption of an identical tax statute. External consistency addresses both the unfairness of a tax imposed on an activity to which the taxing state bears no special relation or confers any proportionate benefit and the threat of multiple taxation caused by another state's imposition of a tax that is similar in nature.

a. **The Taxing Statute is not internally consistent because it necessarily creates multiple taxation if another state adopts an identical statute.**

Internal consistency focuses on the text of the challenged statute and hypothesizes a situation where other states have passed an identical statute. *Goldberg*, 488 U.S. at 261. To be internally consistent, a tax must be structured so that if every state were to impose an identical tax, no multiple taxation would result. *Id.* The Taxing Statute imposes a tax on transportation for hire, without regard to the origin or destination of the trip or where a bus ticket is delivered, and arguably, without regard to where the services are rendered. Oklahoma's statute does not speak of bus tickets or contain a credit mechanism. An identical statute passed by another state would necessarily include Section 1354(1)(C) and the Section 1352(L)(4) definition of a sale of services (i.e. furnishing or rendering of services), and necessarily would not contain any credit for taxes paid to another state. Should other states adopt an identical statute the Taxing Statute and the Commission's application thereof create the threat of multiple taxation (hereinafter "identical taxation") and therefore internal inconsistency, in at least two situations. The absence of a credit mechanism means that identical taxation cannot be eliminated.

The first situation is one where Section 1354(1)(C) is applied differently by Oklahoma and at least one other taxing jurisdiction. Oklahoma might choose to apply Section 1354(1)(C) only to those tickets delivered in Oklahoma, but another state might choose otherwise and impose the tax on the basis of where services are rendered. The other state would tax transportation services rendered in its state even though the ticket was delivered in Oklahoma. The identical taxation in



this situation would occur because one state chose to apply the statute in accordance with the definition of Section 1352(L) (i.e. where services were rendered), while another (Oklahoma) applied the identical statute on the basis of tickets delivered within its state.[11] The absence of a credit mechanism in both states' statutes means this identical taxation could not be eliminated.

The second situation in which identical taxation could arise hypothesizes that Oklahoma and the other taxing state each disregard where the ticket was delivered and instead apply Section 1352(L) so as **not** to be limited to those services rendered within the taxing state. Oklahoma asserts that Section 1352(L) entitles it to tax the entire gross receipts of a sale of transportation regardless of whether that transportation is furnished or rendered in Oklahoma. Another state with an identical statute could do the same. Identical taxation would necessarily result. The entire gross receipts of the ticket delivered in Oklahoma for travel between Minneapolis, Minnesota and Madison, Wisconsin could be subject to Oklahoma's, Minnesota's and Wisconsin's taxing statutes in this situation. Once again, the absence of a credit mechanism means the identical taxation would not be eliminated.

If the express language of the Taxing Statute is respected, identical taxation would be avoided only if Oklahoma and the other states each limited the tax to gross receipts from transportation services furnished or rendered within its state (or

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[11] *See* Finding of Fact Conclusion of Law Regarding the Tax Claim of the Oklahoma Tax Commission, *In re Eagle Bus manufacturing (Greyhound), et al.*, Case No. 90-00985-B-11 to 90-00990-B-11 (Bankr. S.D. Tex. 1993); Respondent's Addendum (hereinafter "Respondent's Add. ____") at 7-8.

amended the statute to provide a credit for taxes paid to another state). The Taxing Statute is not internally consistent, fails the apportionment prong, and is thus, violative of the Commerce Clause.

**b. The lower courts correctly determined that the Taxing Statute is not externally consistent.**

The Commission contends that the Eighth Circuit decision is in conflict with the applicable decisions of this Court and the Oklahoma Supreme Court. The Commission's contentions are based upon inconsistent reasoning which mischaracterizes the taxable activity and ignores the practical and economic effect of the tax on interstate commerce. The Taxing Statute is not externally consistent because it: (1) taxes revenue attributable to more than the in-state component of the activity being taxed; (2) creates a risk of multiple taxation; and (3) fails to provide a credit provision to avoid the risk of multiple taxation.

**(1) The Taxing Statute taxes revenue attributable to more than the in-state component of the activity being taxed.**

This Court in *Goldberg* stated that:

> The external consistency test asks whether the State has taxed only that portion of the revenues from the interstate activity which reasonably reflects the in-state component of the activity being taxed.

*Goldberg*, 488 U.S. at 262. In examining a tax under external consistency, a court must examine the in-state business activity



which triggers the taxable event and the practical or economic effect of the tax on that interstate activity. *Id.* To be externally consistent, a tax on the gross receipts of interstate transportation services must be apportioned to reflect the fact that a portion of the gross receipts of the sale of interstate transportation services is attributable to activity in other states. *See Goldberg*, 489 U.S. at 264 citing *Central Greyhound*, 334 U.S. at 663.

The Eighth Circuit recognized that the price of interstate bus transportation reflects the value of the transportation service rendered or furnished in other states. *In re Jefferson Lines*, 15 F.3d 90, 92 (8th Cir. 1994) ("a ticket price is set at least partially on the number of miles travelled"). Oklahoma taxes the entire gross receipts of interstate transportation services without any regard to the fact that a significant portion of the miles travelled are outside Oklahoma. By imposing a tax on the gross receipts of the interstate transportation services, Oklahoma seeks to collect a tax that cannot "reasonably reflect the in-state component of the activity being taxed," *i.e.* transportation services. *Goldberg*, 488 U.S. at 262.

For example, an interstate bus ticket delivered in a town within Oklahoma and close to the Oklahoma border for a trip which proceeds immediately across the Oklahoma state line is taxed at the very same rate as a bus ticket delivered in a town in the middle of Oklahoma for "intrastate" transportation service which solely uses Oklahoma roads. The amount of tax levied by Oklahoma on interstate transportation services has absolutely no relationship with the "in-state component of the activity being taxed." *Id.* Permitting Oklahoma to levy a tax on the entire gross receipts of the interstate transportation

services would enable Oklahoma to receive tax revenue which logically and directly results from out-of-state activities.

### (2) *Central Greyhound Lines, Inc. v. Mealey*

As set forth at the outset, this Court has previously addressed the constitutionality of a tax on interstate bus transportation. *See Central Greyhound*, 334 U.S. at 655-56. In *Central Greyhound*, this Court concluded that an unapportioned tax imposed on the gross receipts of transportation services was an impermissible burden on interstate commerce. *Id.* "The vice of such a tax is that it lays 'a direct burden upon every transaction in [interstate] commerce by withholding, for the use of the State, a part of every dollar received in such transactions.'" *Id.* at 663. Since Oklahoma taxes the entire gross receipts of the transportation regardless of the pro rata portion of the trip which occurs in the state, Oklahoma is attempting to directly burden every mile and dollar relating to interstate travel. To impose a tax as if the activity is confined solely to Oklahoma does not eliminate the relation of the other states to the activity nor eliminate the benefits which the other states confer upon the activity within their borders. *Id.* at 660.

The principles and reasoning of *Central Greyhound* remain sound even after *Complete Auto*, as is evidenced by this Court's use of the decision in *Goldberg* to demonstrate that the external consistency test is essentially a practical inquiry. *Goldberg*, 488 U.S. at 264. Nonetheless, the Commission necessarily asserts that the reasoning of *Central Greyhound* is "inapposite" to the present case, an argument the lower courts have rejected out of hand. The Commission seeks to distinguish *Central Greyhound* either on the grounds: (i) that the tax in *Central Greyhound* concerned a tax on the "gross



receipts from transportation" as opposed to the Taxing Statute in this case which is a tax on the "gross receipts ... of each sale of ... transportation for hire," or (ii) the tax in *Central Greyhound* was an "income tax." *Central Greyhound*, 334 U.S. at 654; OKLA. STAT. tit. 68 § 1354(C)(1); Petitioner's Brief at 12-13. Neither is correct. The first distinction is not constitutionally significant, and the second distinction is totally unsupportable.[12] This Court and other Courts have rejected arguments which attempt to distinguish precedent based upon the label of the tax. *See International Harvester v. Dep't of the Treasury*, 322 U.S. 340, 349 (1944); *LeTourneau Sales & Service, Inc. v. Olsen*, 691 S.W.2d 531, 536 (Tenn. 1985) (rejecting argument that *Ingram-Richardson, supra* was not applicable to Commerce Clause analysis of a sales tax because it involved a gross receipts tax rather than a sales tax). Furthermore, *Complete Auto* emphasizes the importance of "looking past the formal language of the tax statute to its practical effect." *Quill* 504 U.S. at ___, 112 S.Ct at ___, 119 L.Ed.2d at 105; *Complete Auto*, 430 U.S. at 279. A tax with the same economic and practical impact held to be unconstitutional should not be found constitutional because of "magic words or labels." *Quill* 504 U.S. at ___, 112 S.Ct at ___, 119 L.Ed.2d at 105. Adopting the Commission's "formal" distinction of *Central Greyhound* would allow the constitutional validity of a tax statute to "hinge on legal terminology, draftsmanship and phraseology." *Id.*; *Complete Auto*, 430 U.S. 274. As noted by the Eighth Circuit, the distinction between *Central Greyhound* and this case is not

[12] *Complete Auto* rejected attaching "constitutional significance" to the semantic difference the Commission seeks to place upon a tax on the gross receipts and a gross receipts tax. *Quill* 504 U.S. at ___, 112 S.Ct. at ___, 119. Ed.2d at 105; *Complete Auto*, 430 U.S. at 288.

significant enough to bear the weight the Commission seeks to place upon it. *Jefferson Lines*, 15 F.3d at 93.

**(3) Because the Taxing Statute is imposed on activity dealing with the movement of tangible objects over identifiable routes, it should be apportioned to reflect the in-state component of such activity.**

The Commission's contention that the tax is externally consistent and does not need to be apportioned because the taxable activity is the sale of a ticket, not of interstate transportation services and thus, is imposed upon a "purely local event" is without merit.[13] The Eighth Circuit refused to accept the Commission's argument as "too technical and [one

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[13] Furthermore, by characterizing the tax as not on interstate transportation services, but merely a "bus ticket", the Commission attempts to "localize" the taxable transaction within the borders of Oklahoma much the same way the State of New York tried to "localize" the gross receipts of Greyhound solely within the borders of New York. *Central Greyhound*, 334 U.S. at 660.

When analyzing state taxes under the Commerce Clause, this Court in *Central Greyhound* and thereafter has rejected such formalistic reasoning asserted by the Commission, but instead has consistently focused on the economic and practical realities of the tax. *Central Greyhound*, 334 U.S. at 657; *Goldberg*, 488 U.S. at 262. As recognized by this Court in *Central Greyhound*, legal fictions of the kind the Commission is presently asserting (localizing interstate transportation services) are especially dangerous in the disposition of constitutional issues, because of the risk of confounding both users and not merely readers. 334 U.S. at 659.



which] flies in the face of how bus ticket prices are set." *Jefferson Lines*, 15 F.3d at 92. The Eighth Circuit further reasoned:

> To say that only the purchase of a ticket is taxed, and not the use of the ticket, ignores the fact that the real value of the ticket is the right to ride a bus. The ticket without the travel would be of scant value to a customer. We will not separate the sale of a piece of paper from the service which it represents. To hold otherwise would elevate form over substance and require this Court to ignore economic realities.

*Jefferson Lines*, 15 F.3d at 92.

The formalism of the Commission's argument ignores the practical inquiry of the external consistency test. *Goldberg*, 488 U.S. at 264. This is a tax on interstate transportation for hire: it is obvious that a tax on such transportation could be apportioned by the miles traveled within a particular state. In fact, this Court in numerous cases has approved apportionment formulas for taxes based upon miles traveled in a state especially when the tax dealt with the movement of large physical objects over identifiable routes. *Id.* citing *American Trucking Associations, Inc. v. Scheiner*, 483 U.S. 266 (1987) (trucks); *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434 (1979) (cargo containers); *Complete Auto, supra* (motor carriers); *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U.S. 157 (1954) (oil pipelines); and *Central Greyhound Lines, Inc. v. Mealey, supra* (buses); *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250 (1938) (tax on gross receipts of intrastate train travel is valid while a like tax on interstate train travel is not).

The Commission further asserts that apportionment is unnecessary because it is merely utilizing a "sales tax" *measured by* the gross receipts of the sale of interstate transportation services.[14] The Commerce Clause is not interested in the label of the tax, but that the tax is a "**fair measure** of a state's contacts with a given commercial transaction in all four aspects of *Complete Auto.*" *Itel Containers v. Huddelston*, 507 U.S. ___, 113 S.Ct. ___, 122 L.Ed.2d 421, 436 (1993) [Emphasis Added]. Local taxes **measured by gross receipts** from interstate commerce have often been pronounced unconstitutional. *See Western Livestock v. Bureau of Revenue*, 303 U.S. 250, 255-56 (1938) [Emphasis Added].[15]

[14] The Commission's position ignores a truism of economics. That being, as discussed earlier, "a tax is as much a tax on the measure as it is a tax on the so-called subject." Jenkins, at 242.

[15] "The vice characteristic of those taxes which have been held invalid is that they have placed on the commerce burdens of such a nature as to be capable, in point of substance, of being imposed *Fargo v. Michigan*, 121 U.S. 230 (1887); *Philadelphia & S.S. Sou. Co. v. Pennsylvania*, 122 U.S. 326 (1887); *Galveston, H. & S. A.R. Co. v. Texas, supra.* (210 U.S. 217, 28 C. Ct. 638 (1908); *Meyer v. Wells, Fargo & Co.*, 223 U.S. 298 (1912) or added to *Crew Levick Co. v. Pennsylvania*, 245 U.S. 292 (1917); *Fisher's Blend Station, Inc. v. State Tax Commission*, 297 U.S. 650 (1936), with equal right by every state which the commerce touches merely because interstate commerce is being done, so that without the protection of the commerce clause it would bear cumulative burdens not imposed on local commerce. *See Philadelphia & S.S. Sou. Co. v. Pennsylvania, supra.* 346; *Case of State Freight Tax*, 15 Wall. 232, 280 (1872); Bradley, J. dissenting in *Maine v. Grand Truck Ry. Co.*, 142 U.S. 217, 235 (1891); cf. *Pullman's Palace-Car Co. v. Pennsylvania*, 141 U.S. at 26 (1891)." *Western Livestock*, 303 U.S. at 255-256.



The Taxing Statute is not a "realistic legislative solution to the technology of the present-day" bus transportation industry. *See Goldberg*, 489 U.S. at 265. Rather the Commission seeks to accomplish that which this Court prohibited in *Central Greyhound.* Five lower courts have dealt with this issue, and each of the five has concluded that this is an unapportioned tax which violates the Commerce Clause of the United States Constitution.[16]

**(4) The Taxing Statute is not externally consistent because it results in multiple taxation.**

The Taxing Statute's failure to limit the levy to those gross receipts relating to transportation services rendered in Oklahoma creates a substantial threat of multiple taxation on interstate transportation services, a factor to consider in determining whether a state tax is externally consistent. *Goldberg*, 488 U.S. at 261-262. For this purpose, multiple taxation need not occur under an identical statute. *Id.* at 261; *Armco v. Hardesty*, 467 U.S. 638, 644 (1984) (analysis of similar but not identical tax to demonstrate multiple taxation). Even if no other state sought to tax its proportionate share of the revenue from interstate transportation, such abstention

[16] *See In re Jefferson Lines, Inc.*, BKY No. 3-89-4137, United States Bankruptcy Court, District of Minnesota (1992), Joint Appendix at 7; *In re Jefferson Lines, Inc.*, Civil. No. 3-92-467, United States District Court, District of Minnesota (1992), Joint Appendix at 17; *Oklahoma v. Jefferson Lines, Inc. (In re Jefferson Lines)*, 15 F.3rd 90 (8th Cir. 1994), Joint Appendix at 24; *In re Eagle Bus Manufacturing, Inc.*, et al., Case No. 90-00985-B-11 to 90-00990-B-11, United States Bankruptcy Court, Southern District of Texas (1993), Respondent's Addendum A; *In re Eagle Bus Manufacturing, Inc. et. al.*, Civil Action No. B-93-58, United States District Court, Southern District of Texas (1993), Respondent's Addendum B.

would not justify the taxing by Oklahoma of the entire gross receipts of the interstate transportation service. *Id. See also Central Greyhound*, 334 U.S. at 663.

To see the risk of multiple taxation, one need only consider a scenario where a state other than Oklahoma imposes a use tax or a gross receipts tax relating to the portion of the bus route which takes place in that state. The Commission's position requires Jefferson to collect an Oklahoma sales tax on the entire gross receipts of the interstate transportation services. In addition, Jefferson could be required to collect a use tax or gross receipts tax in each of the other states through which its transportation services are rendered. The result would be multiple taxation on interstate commerce.[17]

**(5) The Taxing Statute is not externally consistent because absent a credit mechanism the risk of multiple taxation cannot be avoided.**

The risk of multiple taxation demonstrated above points out another fundamental flaw of the Taxing Statute -- the absence of a credit for taxes (such as use taxes or gross receipts taxes) paid to other states. Because the Taxing Statute fails to provide a credit for taxes paid to other states on the transportation services rendered in those states, the Taxing Statute cannot eliminate this multiple taxation. *Goldberg* 488 U.S. at 264; *D.H. Holmes Co. v. McNamara*, 486 U.S. 24, 31 (1988) (The ... taxing scheme is fairly apportioned, for it

[17] The Commission acknowledged the similarity between the Oklahoma sales tax and the Oklahoma use tax when it cited *Oklahoma Tax Commission v. Sisters of the Sorrowful Mother*, 97 P.2d 888 (Okla. 1940) in the Petitioner's Brief for the proposition that the **sales** tax is not a tax on property or income. *Sisters of the Sorrowful Mother* is a **use** tax case.



provides a credit against its use tax for sales taxes that have been paid in other states). *See also, Griffes v. Barringer*, 1 F.3d 1331 (2d Cir. 1993) *cert denied* ____ U.S. ____, 114 S.Ct. 879, 127 L.Ed.2d 75 (1994) (absent a credit provision multiple taxation would burden interstate commerce).[18]

**c. Contrary to the Commission's assertions, the economic incidence of this tax is not in accordance with the principles of this Court's Commerce Clause decisions.**

**(1) *McGoldrick, Wardair, Itel.***

The Commission appears to assert that because the Taxing Statute is a sales tax, this court need not scrutinize the tax under the *Complete Auto* test. Regardless of the nature of the state tax on commerce, the tax must be scrutinized to determine whether it imposes a disproportionate and discriminating burden on interstate commerce.[19]

[18] The Commission contends that a credit provision is unnecessary because no multiple taxation will result because an income tax imposed by another state does not constitute multiple taxation. Without conceding this point, the most obvious source of multiple taxation in this sales tax context is a use tax on the purchaser and consumer imposed by another state within which the interstate transportation services would be rendered. *See Associated Industries of Mo. v. Lohman*, ____ U.S. ____, 114 S.Ct. 1815, 128 L.Ed.2d 639 (1994) (there is no dispute that sales taxes and use taxes are imposed on substantially equivalent events). As the discussion above demonstrates, this Court recognizes that absent credit provisions, a use tax may create multiple taxation with respect to an activity that is the subject of a sales tax.

[19] As recognized by Justice Stevens in his concurrence in *Goldberg*, it is insufficient to say in response to a discrimination claim that the tax is a sales tax. *Goldberg*, 488 U.S. at 269 n.1 (Stevens, J. concurring). Because

The Commission asserts that the Eighth Circuit's decision is inconsistent with *McGoldrick v. Berwind-White Coal Mining Co.* *McGoldrick* is discussed earlier at pages 15-16 herein. This Court upheld the tax in *McGoldrick* because it was imposed on goods delivered in the taxing jurisdiction, not because the contract was executed in that jurisdiction. *Id.* at 58. *McGoldrick* does not stand for the proposition, as the Commission suggests, that sales taxes are exempt from Commerce Clause scrutiny or that the execution of an agreement is sufficient to justify imposition of a sales tax. *Id.*

Likewise, the Commission's argument that the tax on the sale of **interstate** transportation services is analogous to a tax on the discrete sale of goods is illogical. The Commission would like this Court to believe that the "purchase" of an interstate bus ticket is a discrete event in which only the State of Oklahoma has an interest. However, the Commission's reasoning ignores the fundamental notion that the "purchase" of a good (i.e., delivery) ends that good's participation in the stream of interstate commerce, at least for a time. On the other hand, the "purchase" of an interstate bus ticket necessarily triggers activity in multiple states and initiates the rendering of that service's participation in the stream of interstate commerce. *Goldberg*, 488 U.S. 262. The "purchase" of an interstate transportation service is not akin to the purchase (delivery) of a good which is merely utilized or has travelled in interstate commerce. Thus, the Commission's reliance on *Wardair Canada, Inc. v. Florida Dept. of Revenue*, 477 U.S. 1 (1986), *Itel Containers Int'l Corp. v. Huddleston*, 507 U.S. ___, 113 S.Ct. 1095, 122 L.Ed.2d 421 (1993) and *Koch Fuels, Inc. v. Oklahoma Tax Commissioner*, 862 P.2d

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the Taxing Statute applies to interstate activity, the Court must go further. *Id.*



471 (Okla. 1993), which upheld state sales taxes on goods delivered in the taxing jurisdiction, is misplaced.[20] Those cases are consistent with the Court's long line of decisions which permit a state to impose a sales tax on the delivery of goods within that state.[21]

**(2) *Goldberg.***

The Commission asserts that the Eighth Circuit opinion conflicts with this Court's reasoning in *Goldberg*. The nature of the activity being taxed and the tax act in *Goldberg* are substantially different from that in this case. Nonetheless, a careful analysis of *Goldberg* demonstrates that the Eighth Circuit opinion is in fact consistent with *Goldberg*.

In *Goldberg*, Illinois levied a telecommunications tax on the privilege of originating or receiving interstate telecommunications. *Goldberg*, 488 U.S. at 255-56. The tax was measured on the entire gross receipts of telephone calls that originated or terminated at an Illinois "service address". *Id.* at 256. The Court upheld the tax after extensive Commerce Clause analysis.

Arguably, the most difficult issue the Court faced in *Goldberg* was whether the tax was fairly apportioned. The

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[20] The Taxing Statute attempts to tax transportation services furnished **outside** the taxing state.

[21] Although *Wardair* and *Itel* are consistent with said goods decisions, neither *Wardair* nor *Itel* offers constitutional analysis under the interstate Commerce Clause because the parties conceded that the taxes met the four prong test of *Complete Auto*. Rather, each case involved foreign commerce clause challenges. *Wardair*, 477 U.S. at 8; *Itel*, 507 U.S. at ___, 113 S.Ct. 1095, 122 L.Ed.2d at 436.

Court determined that the tax in *Goldberg* was fairly apportioned by examining the in-state component of the activity being taxed and the threat of multiple taxation. *Id.* at 262-264. First, it concluded that the tax reasonably reflected the in-state component of the activity being taxed because it "reasonably reflect[ed] the way that consumers purchase interstate telephone calls". *Id.* Second, the Court determined the stated threat of multiple taxation to be exaggerated; it recognized that most other states lacked a substantial nexus with the consumer's purchase of an interstate call; and further, to the extent there was a limited possibility for multiple taxation, Illinois provided a credit mechanism to avoid actual multiple taxation. *Id.* Finally, the Court acknowledged that due to "insurmountable administrative and technological barriers", the tax was incapable of being apportioned on the basis of mileage or some other geographic division. *Id.* at 263-65.

The Commission has relied on *Goldberg* to support its belief that the Taxing Statute "reasonably reflects the way that consumers purchase bus tickets -- in a single discrete event . . ." Petitioner's Brief at 19. The Commission ignores the economic realities. The Illinois Tax Act "reasonably reflect[ed] the way that consumers purchase interstate telephone calls" because consumers think of themselves as "purchasing telephone calls" as they <u>use</u> their telephones, that is as they speak on or otherwise communicate information from their Illinois service address to other telephones. The Court recognized the relevant intrastate activity to be the consumer's use at the service address, located within Illinois, and not the use of equipment or service situated or rendered in another state or another country, or perhaps in space high above the earth's surface. The Court further recognized that consumers of telephone calls, whether intrastate or interstate, do not



regard themselves as purchasing the "computerized network of electronic paths [that transmit] thousands of electronic signals per minute through a complex system of microwave radios, fiber optics, satellites and cables." *Goldberg*, 488 U.S. at 254 (Court's description of the technology in question in that case).[22] To the Illinois consumer subject to the tax in *Goldberg*, the use of the service address is essentially the same whether the call is made to or comes from the friend next door, the friend in California, or the friend halfway around the world. The same thing cannot be said about bus transportation services. By its very nature, interstate bus transportation necessarily involves travel through multiple states and very real physical contact with these states. A bus travels on highways and stops in various states for food, fuel and additional passengers. The purchaser of bus transportation is purchasing the service, not the ticket. Although the service may be rendered without the ticket, and the ticket may be delivered without the services, the purchaser does not consider the purchase to be complete until the services are performed.

Finally, it is significant that Illinois had no practical apportionment method at its disposal, but instead relied on a credit mechanism to prevent multiple taxation. *Goldberg* at 264. The tax properly was upheld in *Goldberg*. The Eighth Circuit's opinion is consistent therewith.

As the above demonstrates, the Taxing Statute contains three fundamental flaws which prevent it from being fairly apportioned: it does not limit the levy to those gross receipts that are related to the transportation services rendered within

[22] *See also Pioneer Telephone*, 832 P.2d at 851 (taxable event with respect to Oklahoma's sales tax as it applies to telephone calls occurs when the consumer receives the service).

Oklahoma, it creates the risk of multiple taxation, and it fails to provide a credit mechanism to prevent the multiple taxation that it necessarily creates. The Taxing Statute fails to satisfy the apportionment prong of *Complete Auto*.

### 4. The Taxing Statute Discriminates Against Interstate Commerce.

The third prong of *Complete Auto* prohibits a state from imposing a tax that discriminates against interstate commerce. *Complete Auto*, 430 U.S. at 331; *Goldberg*, 488 U.S. 252. The primary purpose behind the discrimination prong is to encourage free trade among the states; freedom to engage in commerce across state lines. To allow Oklahoma to impose a tax on the entire gross receipts of interstate transportation, which inherently consists of activity and services rendered in other states, would subject interstate commerce to the unfair burden of being taxed as to a portion of that revenue by a state which gives protection to that portion, as well as to the state which does not. *Central Greyhound*, 334 U.S. at 662; *Armco*, 467 U.S. at 644. That is, a state may not tax a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the state. *D.H. Holmes*, 467 U.S. at 642.

This Court has previously held that "a tax may violate the Commerce Clause if it is facially discriminating, has a discriminatory intent or has the effect of unduly burdening interstate commerce." *Amerada Hess Corp. v. Director, Div. of Taxation, N.J., Dep't of the Treasury*, 490 U.S. 66 (1989). The term "discriminatory taxation" is not self-defining, as such, discrimination like interstate commerce itself is a practical conception. *Gregg Dyeing Co. v. Query*, 286 U.S. 472, 481



(1932). The Taxing Statute discriminates against interstate commerce for at least two reasons.

#### a. The Taxing Statute subjects interstate commerce to the risk of multiple taxation.

As established above, the Taxing Statute subjects interstate commerce to the risk of multiple taxation. To the extent that interstate transportation is subjected to multiple taxation, a risk not borne by intrastate transportation, discrimination against interstate commerce results. *Armco v. Hardesty*, 467 U.S. at 644-645 (1984).

#### b. The Taxing Statute discriminates against interstate commerce by allocating a disproportionate share of the tax burden to interstate travel.

Even though the Taxing Statute appears facially nondiscriminatory, the practical consequence of the tax is discrimination against interstate commerce. The interstate transportation services are taxed at the same 4% rate as the intrastate transportation services. A one hundred dollar ticket relating to a route entirely within Oklahoma will be taxed at the full 4% rate, or \$4. A one hundred dollar ticket relating to travel only 10 percent within Oklahoma will also be taxed at the full 4% or \$4, even though only 10 percent of the travel relates to travel within Oklahoma. It logically follows that Oklahoma will derive a disproportionate share of its tax revenue from interstate transportation. Oklahoma taxes interstate transportation services at the full rate, even if the service's relation to Oklahoma is trifling in quantity. A transaction (rendering of transportation services) which to a substantial extent actually takes place in other states should not

be taxed as if it takes place entirely in Oklahoma.[23] Accordingly, because Oklahoma fails to apportion this tax, interstate commerce is bearing more than its fair share of the costs associated with such interstate transportation services.

[23] The full extent of the discrimination to interstate commerce caused by a unapportioned tax on interstate transportation was best described by Justice Frankfurter in his dissenting opinion in *Capitol Greyhound Lines v. Brice*, 339 U.S. 542, 557 (1950):

> So long as a State bases its tax on a relevant measure of actual road use, obviously both interstate and intrastate carriers pay according to the facilities in fact provided by the State. But a tax levied for the privilege of using roads, and not their actual use, may, in the normal course of operations and not as a fanciful hypothesis, involve an undue burden on interstate carriers. While the privilege extended by a State is unlimited in form, and thus theoretically the same for all vehicles, whether interstate or intrastate, the intrastate vehicle can and will exercise the privilege whenever it is in operation, while the interstate vehicle must necessarily forego the privilege some of the time simply because of its interstate character, i.e., because it operates in other States as well. In the general average of instances, the privilege is not as valuable to the interstate as to the intrastate carrier.
>
> * * * *
>
> And because it operates in other States there is danger -- and not a fanciful danger -- that the interstate carrier will be subject to the privilege taxes of several States, even though his entire use of the highways is not significantly greater than that of intrastate operators who are subject to only one privilege tax.

*Id.*



The Taxing Statute clearly favors intrastate transportation services by imposing an unapportioned tax on interstate transportation.[24] The Taxing Statute discriminates against interstate commerce by creating multiple taxation and by requiring interstate transportation to bear more than its fair share of the costs of services provided by Oklahoma and associated with such transportation. Accordingly, the Taxing Statute fails the third prong of *Complete Auto*.

### 5. The Oklahoma Taxing Statute Is Not Fairly Related To The Presence And Activities Of The Taxpayer In The State Of Oklahoma.

The fourth prong of the *Complete Auto* test requires that a state tax be fairly related to the presence and activities of the taxpayer in the taxing state. *Complete Auto*, 430 U.S. 274; *Goldberg*, 488 U.S. at 266. "The purpose of this test is to ensure that a state's tax burden is not placed upon persons who do not benefit from services provided by the State." *Commonwealth Edison v. Montana*, 453 U.S. 609 (1981).

The purchaser of interstate transportation services receives some benefit from the transportation services rendered in Oklahoma. However, the passenger receives no benefit from Oklahoma with respect to those transportation services rendered in other states. The interstate transportation service is taxed as if all of the services were rendered in Oklahoma. A tax on the entire gross receipts of the rendering of interstate transportation

[24] Moreover, the economic burden of the Taxing Statute does not necessarily fall only upon residents or "insiders" who can change the tax through the Oklahoma political system. *Goldberg*, 488 U.S. at 266. Thus, the user or consumer who pays the tax does not necessarily control the legislature who short sightedly laid the tax.

services is not fairly related to the benefit provided by Oklahoma. Accordingly, the Taxing Statute fails the fourth prong of *Complete Auto*.

## CONCLUSION

WHEREFORE, for the foregoing reasons, the Respondent, Jefferson Lines, Inc., respectfully requests that this Court affirm the decision of the Eighth Circuit Court of Appeals.

**Respectfully Submitted,**

Dated: September 9, 1994

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## ADDENDUM A

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

| | | |
|---|---|---|
| IN RE: | ) | |
| | ) | |
| EAGLE BUS MANU- | ) | Case No. 90-00985-B-11 |
| FACTURING, INC., | ) | TO 90-00990-B-11 |
| GREYHOUND LINES, | ) | |
| INC., TRAILWAY | ) | JOINTLY |
| COMMUTER TRANSIT, | ) | ADMINISTERED |
| INC., BUSLEASE, | ) | Case No. 90-00985-B-11 |
| INC., GLI BUS | ) | and |
| OPERATIONS | ) | Case Nos. 90-01984-B- |
| HOLDING COMPANY, | ) | 11 |
| GLI FOOD SERVICES, | ) | TO 90-01989-B-11 |
| INC., SOUTHERN | ) | (Chapter 11) |
| GREYHOUND LINES, | ) | |
| CO., GLI HOLDING | ) | JOINTLY |
| COMPANY, CENTRAL | ) | ADMINISTERED |
| GREYHOUND LINES | ) | Case Nos. 90-00985-B11 |
| CO., EASTERN | ) | (Chapter 11) |
| GREYHOUND LINES | ) | |
| CO., and WESTERN | ) | |
| GREYHOUND LINES CO. | ) | [Entered Feb 5, 1993] |
| Debtors. | ) | |

**FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING THE TAX CLAIM OF THE OKLAHOMA TAX COMMISSION**

This matter came before the Court on the Objection of Greyhound Lines, Inc. ("Greyhound") to Claim No. 17,841 filed by the Oklahoma Tax Commission (the "Commission") for recovery of unpaid sales tax in the amount of $906,866.59 (the "Commission's Claim"). John B. Turner and Rebecca M. Fowler represent Greyhound. Douglas F. Price represents the Commission. The Court, having heard oral arguments on September 28, 1992, and having considered the briefs of the parties, and being fully advised in the matter, now makes the following findings of fact and conclusions of law in support of the Order Disallowing the Tax Claim of the Oklahoma Tax Commission:

**I.**

This Court finds that it has jurisdiction pursuant to 28 U.S.C. § 157(a) and 1334(b), and the Order entered on November 11, 1991, confirming the Third Amended Plan of Reorganization under Chapter 11 of the United States Bankruptcy Code for Greyhound Lines, Inc. and Its Affiliated Debtors and that this is a core proceeding under 28 U.S.C. § 157(b)(2)(B).

**II.**

This matter was submitted to the Court on stipulated facts. Greyhound, a Delaware corporation, is a common carrier providing transportation by bus in Oklahoma and many other states. The transportation provided by Greyhound is interstate commerce. Greyhound provides transportation on interstate and intrastate routes. An interstate route is a route which originates in one state and crosses over into another state. An intrastate route is a route solely within a single state.



Greyhound sells tickets in Oklahoma for transportation on the following types of routes:

a. an intrastate route wholly within the State of Oklahoma;

b. an intrastate route wholly within a state other than Oklahoma;

c. an interstate route which commences in Oklahoma and terminates in another state;

d. an interstate route which commences and terminates in Oklahoma, but passes through another state; and

e. an interstate route wholly outside the State of Oklahoma.

The Commission, under authority of Oklahoma law, applies a sales tax at a single specified rate to all tickets for transportation sold in Oklahoma. Greyhound, operating under Oklahoma Sales Tax Permit No. 458229, remits, to the state, sales tax on all tickets sold for transportation on an intrastate route wholly within the State of Oklahoma.

Greyhound filed a voluntary petition seeking relief under Chapter 11 of the Bankruptcy Code on June 4, 1990. The Commission subsequently filed claims in Greyhound's case seeking payment of tax on all tickets sold by Greyhound in Oklahoma during the period June 1, 1987 to May 31, 1990, except those sales for which Greyhound had previously remitted tax, and those sales to governmental entities and

churches which the Commission had determined to be exempt from tax. The total amount in controversy is $906,866.59.

Greyhound objects to the allowance of the claims on the basis that application of Oklahoma's sales tax to the gross receipts from tickets sold in Oklahoma for transportation on routes other than intrastate routes within Oklahoma violates the Commerce Clause of the Constitution.

**III.**

The issue before the Court is whether the Oklahoma sales tax statute, which levies a tax on the gross receipts from sales of tickets for transportation by bus, violates the Commerce Clause of the United States Constitution.

**IV.**

Oklahoma collects sales tax from Greyhound pursuant to the Oklahoma Sales Tax Code. 68 O.S. § 1354(1)(C)[25]. Greyhound argues that imposition of the tax on gross receipts from sales of tickets for any transportation other than on an intrastate route wholly within the State of Oklahoma violates the Commerce Clause of the Constitution.

The United States Constitution expressly authorizes Congress to "regulate commerce with foreign Nations, and

25. The statute reads in pertinent part: Transportation for hire to persons by common carriers, including railroads, both steam and electric, motor transportation companies, taxicab companies, pullman car companies, airlines, and other means of transportation for hire.



among the several States." U.S. Const. Art. I, § 8, cl. 3. This clause has consistently been interpreted to prohibit actions by the states which interfere with interstate commerce. See, e.g., South Carolina State Highway Dept. v. Barnwell Bros., Inc., 303 U.S. 177, 185 (1938). The clause, however, may not be used to "relieve those engaged in interstate commerce from their just share of state tax." Western Live Stock v. Bureau of Revenue, 303 U.S. 250, 254 (1938).

In order to survive constitutional scrutiny, a state tax on interstate commerce, such as the transportation provided by Greyhound, must reflect an appropriate balance between freedom from interference and responsibility for paying a fair share. The Supreme Court identified that balance in Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977).

Deciding that it was the practical effect of a state tax which determines it constitutionality, the Complete Auto Court articulated a four-prong test with which to evaluate the effect of a tax. A state tax will be found to be constitutional only if: (1) the tax is applied to an activity with a substantial nexus with the taxing state; (2) the tax is fairly apportioned; (3) the tax does not discriminate against interstate commerce; and (4) the tax is fairly related to the services provided by the taxing state. Id. at 279.

In order to withstand constitutional scrutiny, a state must satisfy each prong of the test. The Oklahoma tax at issue here cannot withstand this test.

**A. Nexus**

The first prong of the Complete Auto test determines whether the activity subject to the tax has a substantial nexus

with the taxing state. To satisfy this prong of the test there must be a relationship between the activity taxed and the state, and that relationship must be substantial. Quill Corp. v. North Dakota, 119 L.Ed. 2d 91, 107 (1992).

The activity at issue here is transportation on all routes except those wholly within the state of Oklahoma. The Commission, relying on National Geographic Society v. California Bd. of Equalization, argues that the mere sale of the ticket within the state satisfies the requirement that there be a substantial nexus between transportation and the state. 430 U.S. 551 (1977). The National Geographic Court, however, addressed the situation where a California resident received goods in California from an organization which maintained offices in California. The facts in this case, however, differ from those in National Geographic.

Here, Greyhound acknowledges that it maintains offices within the State of Oklahoma. There is, however, no evidence that the transportation at issue is purchased by a resident of Oklahoma. More importantly, the evidence clearly demonstrates that in all instances a portion of the transportation purchased is not received within Oklahoma. Furthermore, in some instances, none of the services received within the state. The conclusion reached in National Geographic, therefore, does not apply here.

The Commission has failed to demonstrate here that there is more than a de minimis connection between the activity at issue and the state. The tax thus fails to satisfy the first prong of the Complete Auto text.



**B. Apportionment**

The second prong of the Complete Auto test requires that a state tax on an interstate activity be fairly apportioned. 430 U.S. at 279. This requirement ensures that each state taxes only its fair share of an interstate transaction. Goldberg v. Sweet, 488 U.S. 252, 263 (1989). Because there is no single apportionment formula, the taxing statute must be analyzed to determine if it is internally and externally consistent. Western Live Stock v. Bureau of Revenue, 303 U.S. 250, 161 (1938).

**1. Internal Consistency.**

"To be internally consistent, a tax must be structured so that if every State were to impose an identical tax, no multiple taxation would result. Thus, the internal consistency test focuses on the text of the challenged statute." Goldberg, 488 U.S. at 263.

The statute at issue here imposes a tax on the gross receipts of each sale of "transportation for hire to persons by common carrier, including . . . motor transportation companies." 68 O.S. § 1354(1)(C). Because the statute fails to identify the point of sale, it allows Oklahoma to tax transportation sold in Oklahoma which occurs partially or completely within another state. The statute also allows Oklahoma to tax transportation sold in other states which occurs within Oklahoma. The text of the statute thus allows Oklahoma to tax the transaction if the receipt of either the ticket or the transportation occurs in Oklahoma.

The transportation at issue here occurs, at least partially, in a state other than Oklahoma. If those states in which transportation occurs had a statute identical to Oklahoma's,

those states would be able to tax the transportation which occurred within their boundaries. For example, if one of the tickets sold in Oklahoma was for travel between Dallas and Houston, Oklahoma would tax the transaction because the ticket sold in Oklahoma, and Texas, if it had an identical statute, could tax the transaction because the transportation occurred in Texas.

The Supreme Court has noted with emphasis that only a tax scheme which allows credits for taxes collected by other states on the same transactions can survive the test of constitutionality. Goldberg, 488 U.S. 256. Oklahoma has no such provision for tax credits. Because the practical possibility of multiple taxation exists here, Oklahoma's taxing statute, therefore, is not internally consistent.

**2. External Consistency.**

To be externally consistent, the tax must apply only to that portion of the revenue from interstate activity which reasonably reflects the in-state component of that activity. Id. at 262. A state tax may thus be applied only to those activities which occur within its borders. Complete Auto, 430 U.S. at 282.

The Oklahoma tax on this interstate activity does not reflect only the in-state component of those activities. Here, Oklahoma attempts to tax a specific interstate activity which physically occurs outside the state. The tax, therefore, is not externally consistent.

The Commission argues that by taxing transportation occurring outside Oklahoma for which tickets are sold in Oklahoma and not taxing transportation which occurs in



Oklahoma for which tickets are sold elsewhere, the state recovers an amount equivalent to what it would recover if it taxes all transportation within the state. The Commission thus argues that the tax is self apportioning.

The Commission cited no authority for this novel theory, and there appears to be none. Moreover, even if there were support in the existing law, the Commission is unable to demonstrate that the proceeds of the tax do, in fact, reflect the transportation provided by Greyhound within the state of Oklahoma. The Commission offers no factual basis for its assumptions and such unfounded assumptions are not sufficient to satisfy the Complete Auto external consistency test.

The Oklahoma statute imposes a tax on activities which physically occur outside its borders. The statute, therefore, clearly fails to satisfy the external consistency prong of the Complete Auto test.

**C. Discrimination Against Interstate Commerce**

The third prong of the Complete Auto test requires the taxing authority to demonstrate that the tax does not discriminate against interstate commerce. Such discrimination can be reflected on the face of the statute, the intent of the statute, or the practical effect of the statute. Amerada Hess Corp. v. Director. Div. of Taxation, N.J. Department of the Treasury, 490 U.S. 66, 75-79 (1989). Here, discrimination against interstate commerce is reflected in the practical effect of the statute.

The tax at issue here is applied to the gross receipts from the sale of a ticket including tickets reflecting travel on an interstate route passing through Oklahoma. An interstate

traveler on one of these routes traveling the same number of miles within the state on an intrastate route will thus pay a greater amount of tax. The tax, therefore, imposes a disproportionate burden on interstate travel. See American Trucking Association, Inc. v. Scheiner, 483 U.S. 266 (1987). Because the tax is discriminatory, it fails to pass the third prong of the Complete Auto test.

**D. Relation to State Services**

The fourth prong of the Complete Auto test analyzes whether the tax imposed is fairly related to the presence and activities of the taxpayer within the state. "The purpose of this test is to ensure that a State's tax burden is not placed upon persons who do not benefit from services provided by the State." Commonwealth Edison v. Montana, 453 U.S. 609 (1981).

Here, the taxpayers are the bus passengers. There is no dispute that the in-state activities of those passengers benefit from the services provided by the State of Oklahoma, which are funded at least in part by the tax at issue. The passengers whose transportation is at issue here, however, are taxed on out-of-state activities as well as in-state activities, and some passengers are taxed on their out of state activities when they have no in-state activity at all.

The out-of-state activities of Greyhound's passengers, which are taxed at the same rate as in-state activities, receive no benefits from the state of Oklahoma. Those out-of-state activities are benefited instead by the services provided by the other states in which those activities are conducted. There is thus no relation between the tax on transportation which occurs outside the state and services provided by the state within



Oklahoma. The tax at issue here, therefore, fails the fourth prongs of the Complete Auto test.

**V.**

The tax at issue here is unable to satisfy all four prongs of the Complete Auto test. Greyhound, therefore, is entitled to an order sustaining its objection to the Commission's Claim. The Commission's Claim is disallowed because it reflects a tax on the gross receipts from Greyhound's sales of transportation over routes outside the state and is thus levied in violation of the Commerce Clause of the United States Constitution. A separate order based on the foregoing findings of fact and conclusions of law shall be entered.

Date: FEB 3 1993

/s/ Richard S. Schmidt
Richard S. Schmidt
United States Bankruptcy Judge

## ADDENDUM B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

| | | |
|---|---|---|
| IN RE: | § | |
| | § | |
| EAGLE BUS MANUFACTURING, | § | |
| INC., ET AL, | § | Civil Action |
| Debtor, | § | No. B-93-58 |
| | § | |
| STATE OF OKLAHOMA, ex rel. | § | |
| OKLAHOMA TAX COMMISSION | § | |
| Appellant, | § | [Filed |
| | § | Oct. 4, 1993] |
| VS. | § | |
| | § | |
| GREYHOUND LINES, INC., | § | |
| Appellee. | § | |

OPINION

The aforementioned cause number represents an appeal from an order entered by the Bankruptcy Court for the Southern District of Texas, Brownsville Division denying claim number 17841 in Greyhound Lines, Inc. voluntary Chapter 11 petition jointly administered as Bankruptcy No. 90-00985-B-11.

STATEMENT OF THE CASE

Greyhound is a common bus carrier providing transportation in Oklahoma as well as other states. Greyhound



sells transportation in Oklahoma for the following types of routes:

a. intrastate routes wholly within the State of Oklahoma.
b. intrastate routes wholly within states other than Oklahoma.
c. interstate routes originating in Oklahoma but terminating in another state.
d. interstate routes originating in Oklahoma and terminating in Oklahoma, but passing through another state.
e. interstate routes wholly outside the state of Oklahoma.

Greyhound Lines, Inc. filed for voluntary relief under Chapter 11 of the Bankruptcy Code on June 4, 1990. In response to this the Appellant, Oklahoma Tax Commission, conducted an audit of Greyhound's books and records, which was completed in November of 1990. The Commission applies a sales tax at a single rate to all tickets for transportation sold in Oklahoma. The audit revealed that Greyhound did not collect state sales taxes from consumers who purchased tickets which involved travel outside the state of Oklahoma.[1]

---

[1] The statute at issue here provides in relevant part:

> There is hereby levied upon all sales, not otherwise exempted in the Oklahoma Sales Tax code, section 1350 et seq. of this title, an excise tax of four and one-half percent (4.5%) of the gross receipts or gross proceeds of each sale of the following........(emphasis added).

Operating under tax permit no. 458229 Greyhound, however, did remit sales tax on all tickets sold for transportation on an intrastate route wholly within the state of Oklahoma.[2]

Accordingly, the Commission filed claim no. 17841 for $908,212.89 representing the amount allegedly owed by Greyhound for transportation sold that did not involve entirely intrastate routes.[3] Greyhound filed an objection to this claim on April 10, 1992 asserting that the alleged tax liability claimed by the Commission was an improper tax on interstate commerce and therefore violative of the Commerce Clause of the United States Constitution. Following oral argument on the issue, the parties filed stipulations of fact and briefs for consideration by the Bankruptcy Court. United States Bankruptcy Judge Richard S. Schmidt applied the four-prong

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> (c) The transportation for hire to persons by common carriers, including railroads both steam and electric, motor transportation companies, airlines, and other means of transportation for hire;

Okla. Stat. tit. 68, § 1354(1)(C)(1981 and Supp. 1990).

[2] There was no dispute and therefore no claim filed concerning these taxes.

[3] This amount reflects the four and one-half percent tax on gross receipts of all tickets sold by Greyhound in Oklahoma from June 1, 1987 to May 31, 1993, except those taxes previously remitted, and those sales to governmental entities and churches which are deemed exempt by the commission, plus penalties and interest.



test enumerated in Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 97 S.Ct. 1076, (1977) and concluded that Oklahoma's sales tax, as applied, failed all four prongs, and accordingly sustained Greyhound's objection. It is from this determination that the Appellant appeals.

Therefore the issue on appeal is does Okla. Stat. tit. 68, § 1354(1)(C)(1981 and Supp. 1990), which levies a tax on the gross receipts from sales of transportation for hire, including interstate routes, violate the Commerce Clause of the United States Constitution, and as a consequence did the Bankruptcy court properly sustain Greyhound's objection to claim no. 17841.

## CONCLUSIONS OF LAW

This appeal is properly before the Court pursuant to 28 U.S.C. § 158 and Bankruptcy Rule 8002. The issues in this case were presented to the Bankruptcy Court by stipulation and involved only questions of law. Therefore the standard of review in this case is De Novo. Matter of Multiponics, Inc., 662 F.2d 709 (5th Cir. 1980).

In what is commonly referred to as the Commerce Clause, the United States Constitution provides: "Congress shall have the power to regulate commerce, with foreign nations, and among the several states, and with the indian tribes." *U.S. Const. Art. 1§ 8, cl 2.* This grant of power has negative implications on a state's power to tax, and thereby regulates certain transactions involving interstate commerce. In fact, the Commerce Clause has been interpreted to prohibit actions by the states that interfere with interstate commerce. See, Quill Corp. v. North Dakota, 119 L. Ed 91 (1992); South Carolina State Highway Dept. v. Barnwell, 303 U.S. 177, 185 (1983).

Notwithstanding, the Commerce Clause may not be used to exempt persons engaged in interstate commerce from their fair share of state tax. Western Live Stock v. Bureau of Revenue, 303 U.S. 250, 254 (1938).

State taxes relating to interstate commerce must reflect a balance between paying a just share of taxes and freedom from interference. In Complete Auto Transit, Inc. the Supreme Court pronounced this balance and set forth a four prong test for determining whether or not a state tax violates the Commerce Clause. A state tax will survive constitutional analysis if:

(1) the tax is applied to an activity with a substantial nexus to the taxing state;
(2) the tax is fairly apportioned;
(3) the tax does not discriminate against interstate commerce; and
(4) the tax is fairly related to the services provided by the taxing state.

Further, in order to pass muster the tax must survive all four of the prongs. Id.

Nexus to the Taxing State

The first prong inquires whether the activity subject to the tax has a substantial nexus or relationship to the taxing state. Id.; Quill Corp. v. North Dakota, 119 L.Ed. 2d 91, 107 (1992)(Holding the relationship between the taxing state and the activity must be substantial). Specifically, the activity to be taxed in this case is transportation provided by Greyhound on all routes except those wholly within the state of Oklahoma.



Appellant cites National Geographic Society v. California Bd. of Equalization, for the proposition that the mere sale of the ticket within the state satisfies the requirement of a nexus between the transportation and the state. 430 U.S. 551 (1977). This Court does not agree. National Geographic involved goods purchased by residents of the state of California and received wholly in California, from an organization that maintained offices in California. The court in National Geographic determined that the goods were subject to the sales tax. The case at hand differs significantly.

Greyhound does maintain offices in Oklahoma, however this is where the similarity to National Geographic ends. There is nothing to show that the transportation at issue here is always purchased by a resident of Oklahoma or that it is always received in Oklahoma. The evidence does, however, demonstrate that the tax on gross receipts taxes a portion of transportation paid for in Oklahoma, but not received in Oklahoma. For example, a ticket purchased in Oklahoma for transportation from Tulsa to Dallas, Texas would be subject to the entire tax, even that portion occurring in Texas. There would be no nexus to Oklahoma for the transportation received in Texas. In fact, as applied, the Oklahoma tax could conceivably tax transportation that does not occur in Oklahoma at all. A ticket purchased in Oklahoma for transportation between Austin, Texas and Dallas, Texas would be subject to the sales tax, yet there is no significant nexus between the transportation and the taxing state. The transportation does not even occur in the state.

In order to follow the Appellant's rational the Court is asked to envision that the good purchased is the ticket, rather than the transportation. The Court is unable to close its eyes to the fact that the good purchased is the transportation, as the

ticket is merely a receipt. The Court does not agree that the purchase of a ticket completes the transaction.

Additionally, the Supreme Court has mandated that the mere origination or termination of interstate activity in a particular state is insufficient to establish a substantial nexus to the taxing state. Goldberg v. Sweet, 488 U.S. 252, 263 (1989)(Concerning the termination of interstate communications). As applied, the activity in this case, transportation on all routes except those wholly within the state of Oklahoma, has nothing more than a minimal connection to the taxing state. Therefore the tax fails the first prong of Complete Auto. This analysis alone would be sufficient for the Bankruptcy Court to find that the tax, as applied to Greyhound, was violative of the Commerce Clause. Nevertheless, the Court will consider the remaining factors.

Apportionment

The second prong of the Complete Auto test requires the Court to consider whether the tax is fairly apportioned. In other words, to consider whether the state is taxing only its fair share of an interstate activity, as opposed to taxing the entire interstate activity. Goldberg, 488 U.S. at 260-261.

While the Supreme Court does not mandate a specific apportionment formula, customarily they have determined transportation tax on interstate commerce to be fairly apportioned when it is based on a physical relationship ratio. Interstate activity such as surface transportation over an interstate route is deemed to be fairly apportioned when it is applied only to the activity that is occurring within its borders. See Central Greyhound Lines, Inc. v. Mealey, 334 U.S. 653, 663 (1947); Western Live Stock v. Bureau of Revenue, 303



U.S. 250, 257 (1938); Pan American Airways Inc. v. Government of Virgin Islands, 315 F. Supp. 746, affirmed, 459 F.2d 387 (3rd Cir. 1972) (Recognizing that tax on unapportioned gross sales receipts on transportation can burden interstate commerce, but carving an exception for air travel in that it does not have physical contact with the other state as it passes through its airspace).

The Supreme Court in Central Greyhound was faced with an almost identical issue. The New York Tax Commission was attempting to tax gross sales receipts from Greyhound's transportation sales in New York, which included transportation that occurred in the neighboring states. The Court determined that the entire tax need not fail, but that it must be fairly apportioned to coincide with that portion of the mileage that occurred within the state. Notwithstanding, a specific apportionment method has never been mandated by the Supreme Court, and therefore courts must analyze the tax to determine if it is internally and externally consistent. Complete Auto, 488 U.S. at 261.

To be internally consistent the tax must be structured such that if every state imposed an identical statute, no multiple taxation would occur. Id. The statute involved in this case imposes a tax on the gross receipts of each sale of transportation for hire to persons by common carrier, but does not identify a point of sale with respect to transportation.[4] The result is a tax that could encompass transportation sold in

[4] The Appellant does identify a point of sale definition in its tax code, however it does not appear to apply to Okla. Stat. tit. 68, § 1354(1)(C)(1981 and Supp. 1990).

Oklahoma, but that may not occur in Oklahoma or that may tax transportation sold in other states but that does occur in Oklahoma. In other words, due to the language of the statute, it may allow a tax on the transaction if the receipt of either the ticket or the transportation occurs in Oklahoma.

The activity here, transportation provided by Greyhound on all routes except those wholly within the state of Oklahoma, occurs at least partially in another state. If those states in which the transportation occurred had an identical statute to the one in this case, they would be able to tax the transportation which occurred within their boundaries, thereby causing multiple taxation. For example, assume that one of the tickets sold in Oklahoma was for transportation between Austin and Dallas, and Texas had a statute identical to Oklahoma, one that could conceivably tax both the ticket or the transportation. In that scenario both Texas and Oklahoma could tax the single transaction thereby preventing the tax from being internally consistent. The Supreme Court has noted that only a tax which allows credits for taxes collected by other states on the same transaction can survive this test for constitutionality. Goldberg, 488 U.S. 265.

To be externally consistent, the tax must apply only to that portion of the revenue from interstate activity which reasonably reflects the in-state component of that activity. Id. The Claim in this case was for taxes that reflected out of state activities, and therefore the tax is not externally consistent. The Court does not agree with the Appellant that the taxes in this case are self apportioning because the state does not collect taxes on transportation that occurs in Oklahoma, but is ticketed elsewhere. The Statute therefore clearly fails the second prong of the Complete Auto test.



Discrimination Against Interstate Commerce

The third prong of the test requires the taxing authority to show that the tax does not discriminate against interstate commerce. If the discrimination is reflected on the face of the statute, the intent of the statute, or the practical effect of the statute, then the tax discriminates against interstate commerce and is violative of the Commerce Clause. Amerada Hess Corp. v. Director Div. of Taxation, N.J. Department of the Treasury, 490 U.S. 66, 75-79 (1989). The tax in this case is discriminatory in its practical effect in that it could result in multiple taxation on interstate travelers, while intrastate travelers would not subject to the same burdens. This result is demonstrated infra in this Court's discussion of apportionment.

Relation to State Services

The last prong of the Complete Auto test inquires as to whether or not the tax imposed is related to the presence and activities of the tax payer within the state. The purpose of such an inquiry is to prevent the state's tax burden from hindering those who do not benefit from the services provided by the state. See Commonwealth Edison v. Montana, 453 U.S. 609 (1981).

There is no dispute that the bus passengers/tax payers in this case that travel on intrastate routes in Oklahoma benefit from the services provided by Oklahoma. However, the activities in this case concern actions that occur, at least in part, out of the confines of Oklahoma. The passengers who travel out of the state of Oklahoma, but purchased their tickets in Oklahoma, pay taxes on this transportation, yet for the period that they are not in Oklahoma they do not receive the benefit of Oklahoma's services. Therefore there is no relation

between some the activities attempted to be taxed in this case and the services provided by the State and as a result the tax fails the last prong of Complete Auto.

After a De Novo review of the Bankruptcy Judge's denial of the Appellant's Claim in Bankruptcy No. 90-00985-B-11, it is the Opinion of the Court that because the tax as applied in this case does not satisfy the Supreme Court's test in Complete Auto it was properly denied. The Bankruptcy Court's Order is AFFIRMED.

DONE at Brownsville, Texas this 4th day of October, 1993.

/s/ Filemon B. Vela
FILEMON B. VELA
United States District Judge

(5)



No. 93-1677

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1994

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STATE OF OKLAHOMA, *Ex Rel.* OKLAHOMA TAX COMMISSION,
*Petitioner,*

v.

JEFFERSON LINES, INC.,
*Respondent.*

---

**On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit**

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**BRIEF OF THE NATIONAL CONFERENCE OF STATE LEGISLATURES, COUNCIL OF STATE GOVERNMENTS, NATIONAL ASSOCIATION OF COUNTIES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, NATIONAL LEAGUE OF CITIES, AND U.S. CONFERENCE OF MAYORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER**

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## QUESTION PRESENTED

Whether the State of Oklahoma may impose a sales tax, measured by the full sales price, on the sale of bus tickets within the State, where a portion of the route for which the ticket is to be used extends outside the State's borders.

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## INTEREST OF THE *AMICI CURIAE*

*Amici*, organizations whose members include state, county, and municipal governments and officials throughout the United States, have a compelling interest in legal issues that affect state and local governments. Some of the most significant of those issues involve the scope of the limits placed on state and

local taxing authority by the Commerce Clause of the United States Constitution. The Eighth Circuit's invalidation of Oklahoma's sales tax, which is imposed on in-state customers who purchase bus transportation tickets from in-state vendors, raises a serious threat to the well-established power of States to collect taxes on sales transactions occurring completely within their borders (and which are facilitated by a full panoply of state services, such as fire and police protection). Sales taxes are an increasingly important source of revenue for state and local government. *See, e.g.*, Jerome R. Hellerstein & Walter Hellerstein, *State and Local Taxation* 661 (5th ed. 1988) ("The increasing reliance of the States on sales taxes is one of the most significant developments in State finances during recent times."). Hence, this threatened inroad on the ability to collect sales taxes is of significant concern.

Because of the importance of this issue to *amici* and their members, *amici* submit this brief to assist the Court in its resolution of this case.[1]

## STATEMENT

*Amici* adopt petitioner's statement of the case and provide only the following summary of points relevant to *amici*'s argument. Oklahoma's sales tax legislation imposes a 4.5% tax on a broad range of sales, including the sale of most forms of tangible personal property and many services. Okla. Stat. tit. 68, § 1354. Transportation for hire is among the types of services whose sale is subject to this general sales tax. *Id.* at § 1354(1)(C). The sales tax is to be paid

[1] The parties have consented to the filing of this brief *amici curiae*. Letters indicating their consent have been filed with the Clerk of the Court.



by the in-state consumer and collected by the in-state vendor. *Id.* at § 1361. The same sales tax rate applies to the sale of transportation which will take place entirely within the State as applies to the sale of transportation which will take place interstate. Stipulation of Facts ¶ 15 (J.A. 5). The Oklahoma Supreme Court has construed the sales tax statute to apply only to sales occurring within the State, with the sale itself constituting the taxable event. *See* Pet. Br. 11 (citing *Liberty Steel Co. v. Oklahoma Tax Comm'n*, 554 P.2d 8 (Okla. 1976)). Oklahoma imposes no tax on interstate travel sold in other States, even where the travel route passes into or through Oklahoma. Pet. App. A-18 n.1.

## SUMMARY OF ARGUMENT

In striking down Oklahoma's sales tax on the in-state sale of bus tickets on the ground that it failed to satisfy the "fair apportionment" prong of *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), the court of appeals made two fundamental errors. First, it incorrectly concluded that the "taxed activity" for apportionment purposes is interstate transportation, rather than the in-state sale of such transportation. Second, it assumed that constitutionally valid apportionment could only be accomplished through the imposition of a mileage apportionment formula; hence, it failed to consider the merits of apportionment based on in-state sales. Either of these errors is sufficient to require reversal of the court of appeals' judgment.

1. The Court has explained that the "central purpose behind the apportionment requirement is to ensure that each State taxes only its fair share of an interstate transaction." *Goldberg v. Sweet*, 488 U.S.

252, 260-61 (1989). The external consistency test, upon which the court of appeals based its decision, assesses compliance with this requirement by asking "whether the State has taxed only that portion of the revenues from the interstate activity which reasonably reflects the in-state component of the activity being taxed." *Id.* at 262. To answer that question, the "activity being taxed" must first be identified.

Here, the activity being taxed is the sale of bus transportation tickets within Oklahoma. Oklahoma's sales tax, as construed by the Oklahoma courts, is imposed upon the in-state sales transaction itself, not the good or service that is sold. *See* Pet. Br. 13. That the Oklahoma tax reaches sales rather than transportation is further evidenced by the fact that Oklahoma imposes no tax on interstate transportation into or through Oklahoma where the ticket for such transportation was purchased in another State. *See* Pet. App. A-18 n.1. The court of appeals thus erred in assuming that the "activity being taxed" (*i.e.*, the activity to which the tax must be apportioned) was interstate transportation, rather than the sale of that transportation. *See* Pet. App. A-5.

When it is recognized that the activity being taxed is ticket sales, it becomes obvious that Oklahoma's tax is, by its very nature and structure, designed to reach only the in-state component of such sales activity—sales transactions taking place within the State, between an in-state vendor and an in-state customer. The fact that some portion of the value a customer derives from an interstate bus ticket corresponds to out-of-state travel does not change this analysis. The Court has consistently held that sales taxes may be imposed even where some or all of the value of the commodity sold corresponds to its ex-



pected use in interstate transportation. *See, e.g., Itel Containers Int'l Corp. v. Huddleston*, 112 S. Ct. 1095, 1106 (1993); *Wardair Canada, Inc. v. Florida Dept. of Revenue*, 477 U.S. 1 (1986).

In reaching its decision, the court of appeals erroneously relied on *Central Greyhound v. Mealy*, 334 U.S. 653 (1948), a case involving an unapportioned gross receipts tax laid upon interstate bus transportation. The court of appeals' observation that sales taxes have "much in common" with gross receipts taxes cannot give this decision controlling weight here. This Court, in conducting Commerce Clause analysis, has not hesitated to draw distinctions between forms of taxation that are economically similar. *See, e.g., McLeod v. J.E. Dilworth Co.*, 322 U.S. 327, 330-31 (1944) (contrasting sales and use taxes). The court of appeals' attempt to extend the analysis presented in *Central Greyhound* to the very different tax at issue here is particularly inappropriate given the fact that *Central Greyhound* was the product of an earlier jurisprudential era, in which differences between various forms of taxation were of even greater importance than they might be today.

2. Even if the court of appeals were correct in requiring that the Oklahoma tax be apportioned based on the entire interstate transportation service (rather than the sales activity), its judgment should nevertheless be reversed. Its assumption that only a mileage-based apportionment system would yield constitutionally permissible results, *see* Pet. App. A-7-A-8, was plainly in error. The Court " 'ha[s] long held that the Constitution imposes no single [apportionment] formula on the States' " and has consistently "declined to undertake the essentially legislative task of establishing a 'single constitutionally

mandated method of taxation.'" *Goldberg*, 488 U.S. at 261 (quoting *Container Corp. of America v. Franchise Tax Bd.*, 463 U.S. 159, 169 (1983)).

Here, it appears that in-state sales provide an equally valid proxy for the proportion of interstate travel and travel-related services occurring within Oklahoma. In the income tax context, an apportionment formula based solely on sales has been upheld as a constitutionally acceptable measure of in-state activity. *See Moorman Mfg. Co. v. Bair*, 437 U.S. 267 (1978). In any event, the party challenging a particular method of apportionment bears the burden of demonstrating that the method selected is unfair, *see, e.g., Container*, 463 U.S. at 180-82, and respondent has not even begun to carry this burden. There has been no showing that Oklahoma's tax reaches a greater share of sales receipts than "reasonably reflects the in-state component" of respondent's interstate transportation services. *Goldberg*, 488 U.S. at 262. Indeed, there is no indication that Oklahoma would collect any less tax from respondent if it were to switch from its present system of taxing only in-state sales, to a mileage-based apportionment formula applied to all interstate transportation, wherever sold.



## ARGUMENT

In *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977) the Court "specifically reject[ed] the view that the States cannot tax interstate commerce, while at the same time placing limits on state taxation of interstate commerce." *Goldberg v. Sweet*, 488 U.S. 252, 259 (1989). Thus, it is now well established that "interstate commerce may be required to pay its fair share of state taxes." *D.H. Holmes Co., Ltd. v. McNamara*, 486 U.S. 24, 31 (1988). To determine whether a tax on interstate commerce is valid, the Court applies the four-prong test set forth in *Complete Auto. See, e.g., Goldberg*, 488 U.S. at 259-60. In striking down the Oklahoma tax, the court of appeals analyzed only one prong of that test—the requirement that a tax on interstate activities be fairly apportioned to activity occurring within the State. *See* Pet. App. A3 - A-8.[2] That analysis was erroneous; Oklahoma's sales tax on bus tickets clearly satisfies the "fair apportionment" requirement.

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[2] Because the court of appeals based its decision on the "fair apportionment" prong, *amici* address only that portion of the *Complete Auto* test in this brief. *Amici* submit, however, that the other prongs of the *Complete Auto* test are easily satisfied as well. It is clear that the activity being taxed—the sale of bus tickets—satisfies the nexus requirement, *see* Pet. Br. 10-11; that the tax, which is applied at the same rate for both intrastate and interstate routes, is nondiscriminatory, *see* Pet. Br. 20; and that the tax is "fairly related to benefits provided the taxpayer." *Complete Auto*, 430 U.S. at 287; *see* Pet. Br. 21.

## I. A SALES TAX APPLICABLE ONLY TO SALES OCCURING WITHIN A STATE'S BORDERS IS, BY DEFINITION, FAIRLY APPORTIONED

### A. Oklahoma's Sales Tax Reaches Only The In-State Portion Of The Activity Taxed

As the Court explained in *Goldberg*, the "central purpose behind the apportionment requirement is to ensure that each State taxes only its fair share of an interstate transaction." 488 U.S. at 260-61. Hence, the first step in determining whether a state tax reaches only "its fair share of an interstate transaction" is to identify the transaction or activity upon which the tax has been imposed. Here, the transaction which the State of Oklahoma seeks to tax is the in-state sale of transportation tickets (or, put differently, the sale of specified transportation services, for which the ticket serves as a receipt).[3] The fact that the Oklahoma tax targets sales transactions occurring within the State, rather than interstate bus transportation generally, is evidenced not only by the wording and the operation of the statute, but also by the fact that the tax does not extend to any transportation sold outside the State, even when it involves travel into or through Oklahoma. *See* Pet. App. A-18 & n.1.

To determine whether a given tax is "fairly apportioned," the Court "examin[es] whether it is internally and externally consistent." *Goldberg*, 488 U.S. at 261. Here, it is obvious that the Oklahoma

[3] Because a ticket is issued which represents the purchased transportation service, *amici* refer for convenience to "ticket sales." However, *amici*'s arguments do not in any way depend on the existence of a ticket or on any supposed distinction between the sale of a ticket and the sale of the transportation service which that ticket represents. *See* Pet. App. A-5.



tax is internally consistent; if every State were to apply a sales tax on only those bus ticket sales occurring within its borders, there could be no multiple taxation. *See id.*; Pet. App. A-4.

The external consistency test asks a more complex question: "whether the State has taxed only that portion of the revenues from the interstate activity which reasonably reflects the in-state component of the activity being taxed." *Goldberg*, 488 U.S. at 262. Here, as explained above, the "activity being taxed" is ticket sales. Next, it must be determined whether the tax reaches only the in-state component of that taxed activity. The Oklahoma tax, by its terms and as construed by the Oklahoma Supreme Court, reaches only those ticket sales which occur within the State. *See* Pet. Br. 11 (citing *Liberty Steel Co. v. Oklahoma Tax Comm'n*, 554 P.2d 8 (Okla. 1976)). By definition, the tax reaches only Oklahoma's fair share of the total universe of ticket sales for interstate transportation: it reaches only those sales transactions occurring within the State between in-state vendors and in-state customers, and leaves untouched all sales transactions occurring outside the State.

Thus, like other state taxes which the Court has upheld, the Oklahoma tax is "'apportioned exactly to the activities taxed,' all of which are intrastate." *Standard Pressed Steel Co. v. Washington Dept. of Revenue*, 419 U.S. 560, 564 (1975) (quoting *Gwin, White & Prince, Inc. v. Henneford*, 305 U.S. 434, 440 (1939)). In *Standard Pressed Steel*, the Court upheld a business and occupations tax measured by the gross receipts from sales made to an in-state customer, despite the fact that the tax on the sales, which were made by an out-of-state manufacturer with help from an in-state representative, "may have

some impact on commerce." *Id. See also Ficklen v. Shelby County Taxing Dist.*, 145 U.S. 1 (1892) (upholding state license tax measured by gross receipts from commissions on sales to local customers) (cited in *Standard Pressed Steel*, 419 U.S. at 564).

As the Court explained in *McLeod v. J.E. Dilworth Co.*, 322 U.S. 327, 330 (1944), "[a] sales tax is a tax on the freedom of purchase." The Oklahoma sales tax, Okla. Stat. tit. 68, § 1354, is a "garden-variety" sales tax. *Cf. Itel Containers Int'l Corp. v. Huddleston*, 113 S.Ct. 1095, 1107 (1993) (Scalia, J., concurring in part and concurring in the judgment). It has as its object the in-state sales transaction. Its justification is, therefore, not narrowly founded on the benefits provided by the State along a given travel route, as the court of appeals assumed, *see* Pet. App. A-6 - A-7, but is implicitly premised on the full panoply of benefits which Oklahoma provides to facilitate the sales transaction, such as fire and police protection, and, more broadly, the provision of civil order (with its attendant requirements, such as a judicial system) in which markets can thrive and transportation companies can sell their services to customers within the State. The Court made a similar observation in *Goldberg*:

> The benefits that Illinois provides cannot be limited to those exact services provided to the equipment used during each interstate telephone call. Illinois telephone consumers also subscribe to telephone service in Illinois, own or rent telephone equipment at an Illinois service address, and receive police and fire protection as well as the other general services provided by the State of Illinois.

488 U.S. at 267. *See also D.H. Holmes Co.*, 486 U.S. at 32 (upholding Louisiana use tax on direct mail



catalogs originating out-of-state, noting that the State "provides a number of services that facilitate Holmes' sale of merchandise within the State: it provides fire and police protection for Holmes' stores, runs mass transit and maintains public roads which benefit Holmes' customers, and supplies a number of other civic services from which Holmes profits").[4]

The constitutional concern with multiple taxation is not implicated where, as here, a tax is imposed on a transaction that is uniquely intrastate and is justified by benefits that are likewise uniquely intrastate. The broad range of benefits which are provided by Oklahoma to those doing business within its borders (and which justify its use of the general sales tax at issue here) could not form the basis for a tax imposed by any other State. The fact that another State might impose a different tax for a different reason on a different aspect of the same interstate activity

[4] This discussion of the benefits provided by Oklahoma sheds light on the nature and purpose of Oklahoma's sales tax and hence assists in demonstrating that the "activity" which is taxed and to which the tax must be "fairly apportioned" is the sale of transportation, rather than the transportation itself. Of course, it also bears on another of *Complete Auto*'s prongs—the requirement that the tax be "fairly related" to the benefits provided. Under that prong, which was not addressed by the court below, the analysis turns on whether the benefits provided bear some fair relation to the taxes paid. Here, the benefits provided in connection with the sale of tickets would be sufficient on their own to justify the sales tax and to satisfy that prong of the test. In fact, the bankruptcy court specifically observed that "the Debtor received police and fire protection, along with other public services, at the locations where it sells tickets and loads its buses" as well as "police protection and public road maintenance on its Oklahoma routes." Pet. App. A-27–A-28; *see* Pet. Br. 21.

would not present a risk of "multiple taxation" in the constitutional sense. As one commentator explains:

> To extend the cumulative burden concept to condemn taxes which cannot be duplicated in other states on the ground that some other tax of a different nature might also burden the interstate transaction would go beyond the purpose for that concept. . . . Two dissimilar taxes are just as likely to be imposed by the same state as by different states and hence just as likely to impose a heavier burden on local transactions as on interstate transactions.

William B. Lockhart, *Gross Receipts Taxes on Interstate Transportation and Communication*, 57 Harv. L. Rev. 40, 75 (1943).

Thus, even if another State's tax were to be imposed in connection with some portion of the interstate travel which results from ticket sales, see Pet. App. A-14 - A-15; Opp. 9-10, that tax would fall on a different activity (*i.e.*, travel within the other State's borders) and would be designed to compensate for a different set of benefits (*e.g.*, road maintenance and highway patrol protection within such other State). It would certainly not amount to multiple taxation. Indeed, as petitioner notes, Pet. Br. 14, if the existence of another tax on a different aspect of the same interstate business were sufficient to invalidate a State's tax scheme, the fact that an interstate business was subject to income tax in one State would preclude further taxation of any kind by any other State—a result plainly at odds with the law and with reality.



**B. Sales Transactions Occurring Within a State's Borders Are Taxable Even Where Out-of-State or Interstate Activity Contributes to the Value of the Item Sold**

As discussed above, Oklahoma's tax, by focusing exclusively on sales transactions occurring within Oklahoma, is by its own terms fairly apportioned to reach only Oklahoma's share of sales activity. The court of appeals reached the opposite conclusion by placing controlling weight on the fact that some portion of the value of an interstate transportation ticket necessarily corresponds to transportation that will take place outside the State's borders. *See* Pet. App. A-6. But this line of reasoning is implicitly premised on the notion that a sales tax may be measured by the total sales price of an item only where the entire value of that item is derived from in-state activities —a notion which the Court has consistently rejected. For example, in *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250 (1938), the Court upheld a tax on the sales proceeds from advertising placed in a journal distributed interstate against the similar challenge that some portion of the value of the advertising to the purchaser corresponded to such interstate circulation: "The tax is not invalid because the value is enhanced by appellants' circulation of their journal interstate any more than property taxes on railroads are invalid because property value is increased by the circumstance that the railroads do an interstate business." *Id.* at 259. *See also Goldberg*, 488 U.S. at 268 n.1 (Stevens, J., concurring) ("A State may assess a sales tax on the entire value of the purchased item even though some amount of that value was added in other States.").

Specifically, the Court has approved sales taxes imposed on items manufactured in other States and

shipped to the taxing State immediately prior to sale, *see, e.g., McGoldrick v. Berwind-White Coal Mining Co.*, 309 U.S. 33 (1940), taxes on the receipts from the sale of items purchased within the State by an out-of-state buyer who intended to transport them to his home State, *see, e.g., International Harvester Co. v. Department of Treasury of Indiana*, 322 U.S. 340, 345-46 (1944), and, perhaps most relevant for present purposes, sales taxes on items that are designed to be used in interstate transportation and whose purchasers derive part or all of the product's value from such interstate use. *See, e.g., Itel*, 113 S.Ct. at 1106 (sales tax on proceeds from lease of cargo containers used solely in international transit); *Wardair Canada, Inc. v. Florida Dept. of Revenue*, 477 U.S. 1 (1986) (sales tax on aviation fuel to be used on international and interstate as well as intrastate flights); *Eastern Air Transp., Inc. v. South Carolina Tax Commission*, 285 U.S. 147 (1932) (sales tax on gasoline to be used in interstate transportation).

From these precedents it is clear that the justification for the sales tax turns not on the fact that the taxing State is the only anticipated site of the enjoyment of a product or service, or the place where the value of the product or service originates. Were such the case, no State could impose any sales tax without first determining what proportion of a product or service's value to the customer could be attributed to activities that have occurred (or that can be expected to occur) in other States—an inquiry which is at odds with common sense notions as to the nature and purpose of the sales tax. Instead, the common denominator in the Court's cases upholding sales taxes is the existence of a sales transaction within the taxing State, and it is this common denominator which



points to the rationale for sales taxes generally: the State's provision of benefits which facilitate a sales transaction within its borders. As the Court explained in *International Harvester*, "[t]he consummation of the [sales] transaction was an event within the borders of Indiana which gave it authority to levy the tax on the gross receipts from the sale." 322 U.S. at 348.

While it is true that the sale of a ticket for transportation is related to the actual interstate travel service provided, the sale remains distinct as a taxable event. Here, as in *International Harvester*, "a local transaction is made the taxable event and that event is separate and distinct from the transportation or intercourse which is interstate commerce." 322 U.S. at 346.

### C. *Central Greyhound* Did Not Address the Constitutional Validity of a Sales Tax on Interstate Travel Tickets

Respondent, like the court of appeals, places great reliance on this Court's decision in *Central Greyhound v. Mealy*, 334 U.S. 653 (1948). *See* Opp. 7-8; Pet. App. A-5 - A-8. That reliance is misplaced. *Central Greyhound* involved New York's "tax on appellant's gross receipts from transportation"—receipts which were generated by a bus transportation service that operated routes falling partially outside of New York. 334 U.S. at 654. It did not consider the constitutional validity of a sales tax imposed on interstate bus ticket sales, nor did the Court treat the gross receipts tax before it in that case as the functional equivalent of a sales tax. Instead, the Court in *Central Greyhound* analyzed the tax as an "unapportioned gross receipts tax" in accordance with

the construction given it by the New York courts. *See* 334 U.S. at 663. This characterization led ineluctably to the invalidation of the tax. *Id.*[5]

That the Court in *Central Greyhound* did not decide the constitutional status of a sales tax, a different form of taxation than the one before it, is made even more clear when two additional factors are considered. First, the State Tax Commission of New York, in defending the tax at issue in *Central Greyhound*, did not attempt to characterize the gross receipts tax imposed on interstate bus transportation as a sales tax. It did not maintain that the tax was imposed upon the sales transaction as distinct from the transit, or that the tax fell on anything other than the interstate bus transit itself. Instead, New York chiefly argued that no interstate commerce was involved, since each taxed journey began and ended in New York. *See* Br. of Appellees (No. 745, O.T. 1946) at 10-22; *see also Central Greyhound*, 334 U.S. at 666-67 (Murphy, J., dissenting). Hence, the Court was not invited (as it plainly was in *Goldberg*, *see* 488 U.S. at 268 n.1 (Stevens, J., concurring)) to analogize the tax before it to a sales tax and to assess its constitutionality on that basis.

Second, the *Central Greyhound* decision was the product of a jurisprudential era which predated the

[5] Justice Frankfurter, writing for the Court in *Central Greyhound*, relied heavily on the majority opinion he authored in an earlier case, *Freeman v. Hewit*, 329 U.S. 249 (1946), in which another unapportioned gross receipts tax was invalidated. *See Central Greyhound*, 334 U.S. at 663 ("[b]y its very nature an unapportioned gross receipts tax makes interstate transportation bear more than 'a fair share of the cost of the local government whose protection it enjoys'") (quoting *Freeman*, 329 U.S. at 253).



modern and pragmatic *Complete Auto* inquiry. Under that earlier mode of analysis, distinctions between various forms of taxes, whatever their economic similarities might be, were often of controlling weight. The fact that a particular form of taxation was struck down during that era, therefore, provides no basis for now inferring the outcome that might have been reached had a different, albeit economically related, form of taxation been under consideration instead.

When these considerations are viewed in light of Justice Frankfurter's contemporaneous directive in *Freeman* that "especially in this field opinions must be read in the setting of the particular cases and as the product of preoccupation with their special facts," 329 U.S. at 252, it is clear that no controlling principles concerning the validity of Oklahoma's sales tax can be drawn from a case that passed on the validity of a different form of tax altogether, and did so during an era in which such differences assumed an even greater significance than they might today. Thus, the analysis set forth in the *Central Greyhound* context cannot simply be transplanted into the present context; instead, the Oklahoma tax must be analyzed on its own terms.

Accordingly, the court of appeals' rote application of the holding in *Central Greyhound* to the facts of this case cannot be justified by that court's observation, even if it were true, that "[s]ales taxes and gross-receipts taxes have much in common." Pet. App. A-7.[6] That different types of taxes may have

[6] While there may be some economic relationship between sales and gross receipts taxes, *amici* agree with petitioner that the two types of taxes have nothing "in common" that is relevant to the constitutional analysis of the "fair appor-

"much in common" does not establish that they should be analyzed in the same manner for Commerce Clause purposes, nor does it establish, as a matter of historical fact, that the Court intended to settle the constitutional fate of both forms of taxation in a ruling that by its own terms addressed only one. On the contrary, the Court's opinions plainly demonstrate that different forms of taxation may require quite different treatment under the Commerce Clause.

For example, in *McGoldrick*, 309 U.S. at 58-59, the Court distinguished an earlier case, *J.D. Adams Manufacturing Co. v. Storen*, 304 U.S. 307, 311 (1938), in which a gross receipts tax on goods shipped in interstate commerce was struck down on the ground that such a tax was imposed on activities occurring in other States. The sales tax in *McGoldrick*, which was also imposed on goods shipped in interstate commerce, was held valid since the tax fell only on "a local activity[:] delivery of goods within the state upon their purchase for consumption," which the Court described as "an activity which

tionment" requirement. *See* Pet. Br. 12-13. Sales taxes are imposed on the in-state sales transaction, while gross receipts taxes are more generally imposed upon the revenue-producing activities of an interstate business, such as the interstate transportation itself. While a sales tax finds its justification in the benefits provided by the State in facilitating the sales activity, a gross receipts tax is justified on the basis of the benefits which enable the interstate business to generate receipts (such as highway maintenance and patrol, in the case of transportation services). The two types of taxes have different purposes, are imposed on different activities, are justified on the basis of different benefits, and are even collected from different parties. In short, they are "on different transactions and for different opportunities afforded by a State." *McLeod,* 322 U.S. at 331 (distinguishing sales and use taxes).



apart from its effect on the commerce, is subject to the state taxing power." 309 U.S. at 58.

Similarly, in *McLeod* the Court made clear that a state tax must be analyzed in accordance with its stated character and purpose; a court may not analyze it "as if" it were another form of taxation imposed on a different aspect of interstate activity and justified by a different set of state-provided benefits, simply because the other form of taxation could have been imposed or would have had a similar economic effect. 322 U.S. at 330-31 (analyzing sales tax by reference to the nature and purpose of a sales tax, rather than as if it were a use tax). The *McLeod* Court went on to explain: "A sale[s] tax and a use tax in many instances may bring about the same result. But they are different in conception, are assessments upon different transactions, and in the interlacings of the two legislative authorities within our federation may have to justify themselves on different constitutional grounds." *Id.* at 330.

Other of the Court's decisions have drawn a distinction between unapportioned taxes "on" gross receipts and taxes on other legitimate objects, such as property, which are merely "measured by" such gross receipts. *See, e.g., Cudahy Packing Co. v. Minnesota*, 246 U.S. 450, 453 (1918); Laurence H. Tribe, *American Constitutional Law* 463-64 & nn. 18-19 (2d ed. 1988) (collecting cases). Had the tax at issue in *Central Greyhound* been a sales tax measured by the gross receipts from New York sales, rather than a direct tax on the gross receipts themselves, this line of case law suggests that the outcome could have been different.

In any event, it is clear that the Court in *Central Greyhound* had no occasion to consider, and did not

in fact consider, the constitutional validity of a sales tax of the type now before the Court. The *Central Greyhound* Court did not even consider whether the tax before it could be usefully analogized, based on practical factors, to a sales tax.[7] The *Central Greyhound* decision instead turned on the tax's designation as an unapportioned gross receipts tax, and upon the Court's determination that the taxed activity, although beginning and ending within the State, was interstate commerce. To assert now, nearly fifty years later, that the case would have been decided in the same way had a sales tax rather than a gross receipts tax been at issue is to engage in nothing more than pure speculation. Accordingly, *Central Greyhound* cannot control the outcome of this case.

[7] The Court has drawn upon such analogies in certain instances. *See, e.g., Goldberg,* 488 U.S. at 262 ("The tax at issue has many of the characteristics of a sales tax."); *International Harvester,* 322 U.S. at 349 ("gross receipts" tax applied to "interstate transactions consummated within [Indiana's] borders" operated in the same manner as a sales tax; " 'the local activities or privileges' " upon which the tax was based were "as adequate to support this tax as they would be to support a sales tax") (citation omitted). That the Court did not draw such an analogy in *Central Greyhound* is unsurprising for the reasons detailed above; that the Court chose to do so in *International Harvester,* a relatively contemporaneous case, is a testament to the "wavering doctrinal lines of [the Court's] pre-*Complete Auto* cases." *Goldberg,* 488 U.S. at 259.



## II. STATES MAY EMPLOY AN APPORTIONMENT FORMULA THAT USES IN-STATE SALES, RATHER THAN MILEAGE, AS A MEASURE OF THE STATE'S SHARE OF INTERSTATE TRANSPORTATION ACTIVITIES

As *amici* discuss above, the appropriate activity to be considered in determining whether the Oklahoma tax satisfies the fair apportionment prong of *Complete Auto* is the activity which Oklahoma has chosen ot tax: ticket sales. *See* pages 8-12, *supra.* Yet even if the Court were to find that the interstate transaction or activity to which the tax must be fairly apportioned is the entire transportation service provided to customers, rather than the sale of that service, the Oklahoma tax still satisfies the fair apportionment requirement. The court of appeals' holding to the contrary is premised upon the erroneous notion, repeatedly disavowed by the Court, that States are required to employ a particular mileage-based apportionment formula in taxing interstate transportation.

### A. The Constitution Does Not Require States To Apply Any Particular Apportionment Method Or Formula

The Court " 'ha[s] long held that the Constitution imposes no single [apportionment] formula on the States' "; accordingly, it has consistently "declined to undertake the essentially legislative task of establishing a 'single constitutionally mandated method of taxation.' " *Goldberg,* 488 U.S. at 261 (quoting *Container Corp. of America v. Franchise Tax Bd.,* 463 U.S. 159, 169 (1983)). Thus, the Court has given the States considerable latitude in determining appropriate apportionment formulas, and has upheld taxes based on a wide variety of factors. *See, e.g., Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines,* 405 U.S. 707, 715-16 (1972) (collecting

cases); *American Trucking Ass'n, Inc. v. Scheiner*, 483 U.S. 266, 296-97 & n. 26 (1987); *see also* Paul J. Hartman, *Federal Limitations on State and Local Taxation* 29 (1981). As the Court reiterated in *Goldberg*, neither the Constitution nor the Court's precedents require a State to base its apportionment formula on any particular factor, such as mileage. *See* 488 U.S. at 261. Instead, the constitutional validity of an apportionment formula is determined by reference to the internal and external consistency tests. *Id.*

In light of these precedents, the court of appeals' apparent assumption that "fair apportionment" could only be achieved through a mileage-based formula was clearly incorrect. Despite the recognized validity of a mileage apportionment formula and its apparent ease of administration, it is not the only method of tax apportionment which will yield constitutionally permissible results.[8] Here, it appears

[8] It is, of course, well settled that "[w]here transportation is concerned, an apportionment according to the mileage within the state is an approved method." *Canton R.R. Co. v. Rogan*, 340 U.S. 511, 515-16 (1951); *see Goldberg*, 488 U.S. at 264 & n.14 (collecting cases). Like other apportionment formulas, however, a mileage-based formula for taxing passenger transportation operates in the realm of rough approximation rather than mathematical precision.

While mileage may play some role in fare setting, there are numerous other factors at work in the complex realm of determining prices for intercity passenger transportation, which make it impossible definitively to identify particular fare dollars with particular stretches of road. *See, e.g.*, Roy J. Sampson *et al.*, *Domestic Transportation: Practice, Theory, and Policy* 367 (6th ed. 1990) (in transportation price setting, "[p]roblems of supply and demand, or of costs and value of service, regulation and legal obligations, competition and capacity, and the forces of tradition are intricately interwoven into a pattern of chaos and confusion not unlike the Gordian knot"); *see also* Robert C. Lieb, *Transportation* 187-96 (3d ed. 1985) (discussing various cost and demand factors relevant to pricing of transportation). For example, competitive conditions within a particular market may require price cutting and special discounts, which erode the relationship between price and distance. *See, e.g.*, Adam Bryant, "New York-Washington for $5 Is Cheapest Fare Since 1952," *New York Times*, August 8, 1992 at A1 (discussing fare war between bus lines). Moreover, some portion of any given fare goes to cover services that do not vary with distance traveled, such as those provided at the terminal or in connection with the making of reservations. *See* John R. Meyer and Clinton V. Oster, Jr., *Deregulation and the Future of Intercity Passenger Travel* 221-22 (1987).



that in-state sales receipts provide an equally valid proxy for the proportion of interstate travel and travel-related services occurring within Oklahoma. Indeed, in a related context the Court has accepted sales as an appropriate measure of an interstate business's in-state activity. *See Moorman Mfg. Co. v. Bair*, 437 U.S. 267 (1978).

While some in-state sales taxed by Oklahoma may be for travel taking place partially outside the State, other travel and travel-related activities occurring inside the State are not the subject of in-state sales, and hence are not taxed at all (*i.e.*, where a ticket is purchased in another State for travel into or through Oklahoma). *Cf. Goldberg*, 488 U.S. at 269 (Stevens, J., concurring) ("Although Illinois taxes the entirety of every call charged to an Illinois number, it does not tax any part of the calls that are received at an Illinois number but charged elsewhere.").[9] Moreover, it is probable that customers

[9] While in-state sales receipts may not relate to the in-state proportion of interstate transportation with perfect ac-

who purchase tickets in Oklahoma disproportionately benefit from in-state travel services and amenities (such as those provided at bus terminals within Oklahoma) which facilitate interstate transportation and which constitute some undefined, but significant, segment of the ticket price. *See* Meyer & Oster, *Deregulation* at 222 (discussing terminal costs); *supra* note 8. Ticket sales within the State are also likely to be correlated with advertising and marketing activities conducted within the State.

**B. There Has Been No Showing That Oklahoma's Sales-Based Method of Apportionment Reaches a Disproportionate Share of Interstate Activity in Violation of the Commerce Clause**

It is well settled that the party challenging a particular method of tax apportionment must bear the burden of demonstrating that the method selected results in distortions or disproportionate burdens on interstate commerce. *See, e.g., Container*, 463 U.S. at 180-82 (party challenging income tax apportionment "has the burden of proof; it must demonstrate that there is 'no rational relationship between the income attributed to the State and the intrastate values of the enterprise'") (citations omitted); Hartman, *Federal Limitations on State and Local Taxation* at 29 ("The States have wide latitude in the selection of apportionment formulas, and the application of the formula will not be upset on due process or commerce clause grounds, unless the taxpayer carries a heavy burden of proof.").

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curacy, such "imperfect proxies" are constitutionally acceptable, as long as they are not shown to be "out of all appropriate proportion to the business transacted" in the State. *See Container*, 463 U.S. at 180-83.



Here, even if one assumes that the "activity" to which the Oklahoma tax must be fairly apportioned is the entire package of interstate transportation and related services provided by interstate passenger transportation companies such as respondent, there has been no demonstration that apportionment based on sales receipts within the State overrepresents the amount of such activity occurring in Oklahoma. On the contrary, as the discussion in the foregoing section explains, it appears that sales within Oklahoma would "reasonably reflect[] the in-state component" of the interstate transportation activity. *Goldberg*, 488 U.S. at 262.

Significantly, there has been no showing that Oklahoma would collect less tax revenue than it presently does if it were to implement the mileage-based apportionment formula endorsed by the court of appeals. Were Oklahoma to use a mileage-based formula, rather than its current sales-based method of apportionment, it would clearly be entitled to apply that mileage-based formula to *all* of respondent's gross receipts from ticket sales, regardless of the place of sale. In other words, while Oklahoma would be able to tax in-state sales to a lesser degree than it does under the present system, it would also be able to tax interstate travel within its borders where the tickets for such travel were sold out of state. The net result is uncertain; certainly no evidence has been presented to show that Oklahoma's "share" of tax under the mileage apportionment scheme would be less than the present share it seeks to collect through its sales tax.

Given the lack of any record as to the relative merits of the two means of apportioning the interstate activity at issue, it would plainly be inappropriate for the Court to require Oklahoma to scrap

its own carefully targeted taxation scheme in favor of an entirely different method of tax apportionment. Respondent has not even begun to carry the heavy burden of proof associated with showing Oklahoma's apportionment method to be invalid.

Finally, the fact that another State might choose to apportion taxes based on mileage or some other factor does not establish an unconstitutional risk of multiple taxation. The possibility that varying apportionment formulas will overlap is inherent in the latitude retained by the States to establish tax policy; it does not justify invalidation of a fairly apportioned tax. *See Moorman*, 437 U.S. at 278. Congress must decide whether such risk of overlap is significant enough to require imposition of a uniform tax formula, since "[i]t is to that body, and not this Court, that the Constitution has committed such policy decisions." *Id.* at 280. Accordingly, this Court should again "decline[] to undertake th[is] essentially legislative task . . . ." *Goldberg*, 488 U.S. at 261.

## CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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August 11, 1994

(7)

No. 93-1677

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1994

STATE OF OKLAHOMA, Ex Rel.
OKLAHOMA TAX COMMISSION,

*Petitioner,*

v.

JEFFERSON LINES, INC.,

*Respondent.*

On Writ of Certiorari to the United States
Court of Appeals for the Eighth Circuit

## BRIEF OF THE AMERICAN BUS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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BRIEF OF THE
AMERICAN BUS ASSOCIATION
AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

Pursuant to Rule 37 of the Rules of this Court, the American Bus Association, Inc. respectfully submits this brief as *amicus curiae* in support of the respondent. The parties have consented to the filing of this brief *amicus curiae*. Letters indicating their consent have been filed with the Clerk of the Court.

## INTEREST OF THE AMICUS CURIAE

The American Bus Association ("ABA") is the principal national trade association for the intercity bus industry. ABA's members include more than 500 intercity bus companies, all of whom are engaged in the interstate transportation of passengers by motor vehicle. ABA's members operate more than 20,000

buses and provide more than 90 percent of the intercity bus transportation in the United States.

The issue in this case is of vital importance to ABA's members and the people who ride their buses. The question presented is whether a state may constitutionally impose an unapportioned sales tax on the sale of interstate transportation services, including the portion of the transportation that takes place outside the state. To ABA's knowledge, Oklahoma is the only state that has sought to impose a sales tax on interstate transportation of any kind. To ABA's knowledge, no other state has attempted to impose a sales tax or similar tax on the interstate transportation of either passengers or freight by bus, railroad, truck or airplane since this Court's decision in *Central Greyhound Lines, Inc. v. Mealey*, 334 U.S. 653 (1948). In fact, it appears that Oklahoma itself has not sought to enforce the application of its sales tax statute to interstate transportation generally, but has done so only in the context of asserting tax claims against the estates of two bus companies, respondent Jefferson Lines, Inc. and Greyhound Lines, Inc., after they petitioned for bankruptcy.[1]

Accordingly, there is no basis for the claim of amicus curiae National Conference of State Legislatures et al. ("NCSL") (NCSL Br. at 2) that the decisions below present "a serious threat to the well-established power of States to collect taxes on sales transactions occurring completely within their borders . . . ." Inasmuch as Oklahoma appears to be the only state that has attempted to apply an unapportioned tax to the sale of interstate transportation and has done so only in two instances, the decisions below present no threat whatever to the established taxing authority of the states.

On the other hand, a reversal of the decisions below would have an extremely adverse affect on interstate transportation

[1] See J.A. 3 and *In re Eagle Bus Manufacturing (Greyhound), Inc., et al.*, No. B-93-58 (S.D.. Tex., October 4, 1993) (reproduced at Addendum A-12 to respondent's brief).



companies and on the free flow of interstate transportation. As discussed further below, allowing states to impose unapportioned sales taxes on interstate transportation services would permit, and indeed invite, multiple state taxation of those services, contrary to a core purpose of the Commerce Clause.

The effects would be particularly serious for the intercity bus industry and the public it serves. Largely as a result of intense competition from other modes of transportation, intercity bus companies have been struggling for several decades to maintain their services in the face of declining ridership.[2] The recent bankruptcies of respondent and Greyhound Lines are symptoms of that struggle. In addition, those who continue to ride intercity buses are typically persons of far more limited means and transportation alternatives than users of other transportation modes.[3] For these reasons, of all the sectors of the interstate transportation industry, intercity bus companies and those whom they serve are the least able to bear the very substantial burden that taxes like Oklahoma's would impose on them.

## SUMMARY OF ARGUMENT

The courts below correctly found that Oklahoma's sales tax, as applied in this case, is not fairly apportioned to activity within the state, and therefore contravenes the Commerce Clause, because it has been applied to the full price of interstate transportation services, a portion of which are performed outside the state.

[2] GENERAL ACCOUNTING OFFICE, REPORT TO THE CHAIRMAN, SURFACE TRANSPORTATION SUBCOMMITTEE, COMMITTEE ON COMMERCE, SCIENCE AND TRANSPORTATION, U.S. SENATE, SURFACE TRANSPORTATION — AVAILABILITY OF INTERCITY BUS SERVICE CONTINUES TO DECLINE 9 (JUNE 1992).

[3] *Id.* at 29-32. Surveys have shown, for example, that a far higher proportion of bus riders than consumers of other modes are elderly, young, poor, disabled, reside in rural communities and do not have access to an automobile.

Petitioner is incorrect in arguing that the tax at issue is properly apportioned because it applies only to a transaction, the sale of bus tickets, that occurs entirely within the state, and in relying on decisions upholding unapportioned sales taxes on sales of tangible property. For purposes of constitutional analysis, there are critical differences between taxes on the sale of tangible property and taxes on the sale of services. With respect to taxes on services, the sales transaction is not a discrete activity that can be meaningfully separated from the service that is being sold. In fact, the Oklahoma statute itself defines the sale of taxable services as the "furnishing or rendering of services taxable under this article." Accordingly, under the statutory definition, the activity being taxed is the furnishing of those services. Since part of that activity in this case occurred outside the state, the tax is not properly apportioned.

Furthermore, an unapportioned sales tax on interstate transportation services presents a very real risk of multiple taxation because, in terms of their actual impact and economic effect, there is no essential difference between a sales tax and a gross receipts tax of the kind considered by the Court in the *Central Greyhound* case. Since, under *Central Greyhound*, other states can impose a tax on the gross receipts from their portions of interstate bus trips originating in Oklahoma, allowing Oklahoma to impose an essentially equivalent tax on the price of the entire trips would clearly result in multiple taxation.

This Court's few decisions involving sales taxes on services reflect a recognition that such taxes, to be constitutional, must be apportioned on the basis of where the service is performed. Although in *Goldberg v. Sweet*, 488 U.S. 252 (1989) the Court upheld an unapportioned tax on interstate telephone services, it did so expressly on the grounds that, under the statute considered there, there was no risk of multiple taxation and that the physical characteristics of telecommunications services rendered apportionment infeasible. Indeed, the Court specifically



contrasted the infeasibility of apportionment in those circumstances with the feasibility of apportioning taxes on transportation services such as the bus services involved in *Central Greyhound*.

## ARGUMENT

### THE COURTS BELOW CORRECTLY FOUND THAT OKLAHOMA'S SALES TAX AS APPLIED TO THE FULL PRICE OF INTERSTATE BUS TRANSPORTATION IS NOT FAIRLY APPORTIONED AND THEREFORE CONTRAVENES THE COMMERCE CLAUSE.

Petitioner's and NCSL's central argument is that the courts below erred in concluding that the tax at issue applies to the transportation service itself and therefore violates the Commerce Clause because it is not properly apportioned to activity occurring within Oklahoma. Instead, they argue, the tax applies only to a transaction — the *sale* of the transportation — and because that transaction occurs entirely within the State of Oklahoma, the tax is properly apportioned. In support of their argument, they rely on decisions of this Court upholding state sales taxes on the sale or lease of goods in the taxing state notwithstanding some prior or subsequent movement or use of those goods in interstate commerce. See, *e.g.*, *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U.S. 33 (1940); *Wardair Canada, Inc. v. Florida Dept. of Revenue*, 477 U.S. 1 (1986); *Itel Containers International Corp. v. Huddleston*, 507 U.S. ___, 113 S.Ct. 1095 (1993).

The basic flaw in these arguments, ABA submits, is that they view a tax on the sale of transportation services as equivalent, for constitutional purposes, to a tax on the sale of tangible property. They fail to recognize very important differences between taxes on the sale of tangible property and taxes on the

sale of services. Those differences in this case are critical to a proper constitutional analysis.

The question that the court of appeals addressed (and which ABA will address here) is whether the tax at issue, as applied by petitioner to sales of interstate bus transportation, satisfies the requirement of the Commerce Clause that state taxes be fairly apportioned to activities occurring within the taxing state.[4] As the Court stated in *Goldberg v. Sweet*, 488 U.S. 252, 260-261 (1989): "[T]he central purpose behind the apportionment requirement is to ensure that each State taxes only its fair share of an interstate transaction." In order to be fairly apportioned, the Court has held that a tax must be both internally and externally consistent. *Id.* at 261. Most of this Court's sales tax cases have involved taxes on the sale of tangible property, and the Court has consistently held that such taxes are fairly apportioned because the sale of tangible property involves a specific activity — either the physical delivery of the goods or the transfer of title — that can meaningfully be said to occur entirely within the taxing state. For that reason, such taxes are both internally and externally consistent.

With respect to taxes on *services*, however, the sales transaction is not a discrete activity that can be meaningfully separated from the service that is being sold. In this case, the court of appeals correctly stated:

> To say that only the purchase of a ticket is taxed, and not the use of the ticket, ignores the fact that the real value of the ticket is the right to ride a bus. The ticket without the travel would be of scant value to a customer. We will not separate the sale of a piece of paper from the service which it represents. To hold

[4] The court of appeals did not consider whether the tax satisfied the other three requirements of the Commerce Clause set forth in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 278 (1977), and accordingly ABA will not do so here.



> otherwise would elevate form over substance and require this Court to ignore economic realities.

J.A. 27.

Indeed, the fact that the sale of a service, in contrast to the sale of tangible property, cannot be meaningfully separated from the service itself and the use of that service is reflected in the statutory definition of "sale" in Oklahoma's sales tax statute. OKLA. STAT. tit. 68, § 1352(L)(4) (Supp. 1989) provides, in pertinent part, that for purposes of Chapter 68 (emphasis supplied):

> "Sale" means the transfer of either title or possession of tangible personal property for a valuable consideration . . . *or other transactions as provided by this subsection, including but not limited to:*
>
> . . .
>
> (4) *The furnishing or rendering of services taxable under this article.*

In other words, if the sale is of tangible personal property, the activity being taxed is the physical "transfer of either title or possession." But if the sale is a sale of services, the activity being taxed is "the furnishing or rendering of those services," and the situs of the activity is wherever the services are furnished or rendered.[5]

[5] Petitioner appears at times in its brief to be trying to argue that this case does involve the sale of tangible property — the bus ticket — rather than the sale of transportation services (see Pet. Br. 11-12, 18), but there is plainly no merit to this claim. As it acknowledges elsewhere in its brief (Pet. Br. 7-8), the tax at issue is imposed "upon the sale of tangible property and certain services, including transportation for hire by bus." Amicus NCSL also correctly recognizes that the case involves "the sale of specified transportation services, for which the ticket serves as a receipt." NCSL Br. 8. It also acknowledges that its position does not "in any way depend on the existence of a ticket or on any supposed distinction between the sale of a ticket and the sale of the transportation service which that ticket represents." *Id.* 8, n.3.

Because the activity being taxed in this case, *under the statutory definition*, is Jefferson Lines' furnishing of interstate bus transportation, and because that activity does not occur entirely within Oklahoma, the application of the tax to the entire price of the transportation clearly fails the internal consistency requirement. If Jefferson's activity in providing interstate bus trips was taxed in its entirety by every state in which those trips took place, multiple taxation would obviously result.

Even if the Oklahoma statute (or the tax authorities through interpretation) tried to define the triggering taxable event in some way that gave that event a specific situs in Oklahoma (*e.g.*, defined it in terms of the delivery of the ticket), the tax might pass the internal consistency test, but it would still fail the external consistency test. As this Court explained in *Goldberg v. Sweet*, 488 U.S. at 262:

> The external consistency test asks whether the State has taxed only that portion of the revenues from the interstate activity which reasonably reflects the in-state component of the activity being taxed. . . . We thus examine the in-state business activity which triggers the taxable event and the practical or economic effect of the tax on that interstate activity.

In this case, regardless of the situs of the triggering event, as long as Oklahoma's tax is being imposed on a service that is performed in more than one state, some portion of the price of that service, and therefore some portion of the amount of the tax, will necessarily be for activities that occur outside the state. As the court of appeals correctly observed, the economic realities are that "[a] ticket price is set, at least partially, on the number of miles travelled." J.A. 27.

Furthermore, regardless of the situs of the triggering event, an unapportioned sales tax on interstate transportation services presents a very real risk of multiple taxation and the concomitant stifling of interstate activity. That is so because, in terms of their



actual impact and economic effects, there is no essential difference between a sales tax and a gross receipts tax of the kind considered by this Court in the *Central Greyhound* case. Although a sales tax is imposed, at least nominally, on the purchaser (although collected by the seller) and a gross receipts tax is imposed on the seller, in the case of taxes on interstate transportation services the economic effect is the same.

Consider a bus ticket for a trip between Oklahoma City and Topeka, Kansas which, without any tax, would cost twenty dollars. Whether Oklahoma imposes a 4.5 percent sales tax nominally on the passenger or a 4.5 percent gross receipts tax on Jefferson Lines, the effect on Jefferson and its customers will be the same. If market conditions permit, the total price to the customer will be $20.90 in either case. If market conditions require Jefferson to absorb some part of the cost of the tax by reducing the base ticket price and charging the customer a total price of less than $20.90, the effect of the tax on Jefferson and its customers would still be virtually the same in either case.[6]

Under this Court's decision in *Central Greyhound*, Oklahoma could not impose a gross receipts tax on Jefferson on its total revenue from the ticket in this example. It could only impose such a tax on the portion of that revenue attributable to the transportation in Oklahoma. If that were 50 percent of the trip, both Oklahoma and Kansas could impose a gross receipts tax on only $10.00 of the ticket price. If, however, Oklahoma were permitted to tax the entire $20 by doing so in the form of

[6] If the market imposed a rigid maximum on the total price one could charge the customer, in theory there would be a small difference to the bus company whether the tax was imposed in the form of a sales or a gross receipts tax. For example, if the total price chargeable to the customer in this case were $20.00, a 4.5 percent gross receipts tax would yield Jefferson $19.10 in after tax revenues, whereas under a sales tax, its net revenue would be $19.14. As a practical matter, that difference is not significant. The economic impact of a given tax on companies and their customers will be a function of the size of the tax and market conditions and will be virtually the same whether the tax is in the form of a gross receipts tax or a sales tax.

a sales tax and if Kansas imposed a gross receipts tax on $10 of the revenue from the ticket, the economic effect would clearly be multiple taxation.

Accordingly, the court of appeals correctly concluded that this Court's decision in *Central Greyhound* and the principles established therein are fully applicable in this case.[7]

We believe that this Court's relatively few decisions dealing with sales taxes on services reflect a recognition that such taxes must be apportioned on the basis of where the services are performed if it is feasible to do so. One such case is the Court's seminal decision in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). In *Complete Auto*, the Court upheld what it characterized as a Mississippi sales tax assessed on "transportation of persons or property for compensation or hire *between points within this state*." *Id.* at 275 (quoting Miss. Code Ann., 1942, § 10105 (1972 Supp.) (emphasis supplied.) Significantly, the tax was limited to transportation within the state, and the Court noted that no claim had been made that the tax was unfairly apportioned. *Id.* at 278.

Another case involving a tax on services that the Court described as having "many of the characteristics of a sales tax" is *Goldberg v. Sweet*, 488 U.S. at 262. In that case the Court upheld an unapportioned Illinois tax on interstate telephone calls that are charged to an Illinois service address, and petitioners and NCSL rely on that decision in support of their claims here. In *Goldberg*, however, the Court upheld the tax on the basis of very different facts from those involved here, and we submit that the Court's analysis in fact supports the decisions below.

First, in *Goldberg*, the Court held that there was no possibility of multiple taxation because the Illinois statute allowed

[7] ABA submits that there is no merit to the suggestion of NCSL (NCSL Br. 16-18) that *Central Greyhound* is outmoded and does not reflect current Commerce Clause jurisprudence. *Central Greyhound* has been cited and applied in many cases by this Court, including *Goldberg v. Sweet*, 488 U.S. at 260, 264, on which NCSL relies.



taxpayers a credit in the amount of any tax paid to another state on the same call. 488 U.S. at 263-64. There appears to be no such credit in the Oklahoma sales tax for sales taxes or gross receipts taxes paid to other states on the same interstate bus trip.

Second, the Court in *Goldberg* found that the physical characteristics of interstate telecommunications made apportionment of sales taxes simply infeasible, and in that respect it specifically contrasted taxes on "bus, train or truck" transportation. The Court stated:

> It should not be overlooked, moreover, that the external consistency test is essentially a practical inquiry. In previous cases we have endorsed apportionment formulas based upon the miles a bus, train or truck traveled within the taxing State. But those cases all dealt with the movement of large physical objects over identifiable routes, where it was practicable to keep track of the distance actually traveled within the taxing State. See, *e.g.*, *Central Greyhound*, 334 U.S. at 663 ("There is no dispute as to feasibility in apportioning this tax"); see also *Western Live Stock [v. Bureau of Revenue]*, 303 U.S. [250] at 257. These cases, by contrast, involve the more intangible movement of electronic impulses through computerized networks. An apportionment formula based on mileage or some other geographic division of individual telephone calls would produce insurmountable administrative and technological barriers.

488 U.S. at 264 (footnote omitted).

In the present case, like *Central Greyhound* and unlike *Goldberg*, apportionment on the basis of mileage presents no difficulties, let alone insurmountable barriers, as the court of appeals noted. J.A. 30.

In sum, the courts below correctly held that a state may not impose an unapportioned sales tax on the full price of interstate transportation. Furthermore, ABA submits that the fact that no state, other than Oklahoma on two occasions, has sought to do so reflects a general agreement with that proposition among the states.

## CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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(8)

No. 93-1677

In The

# Supreme Court of the United States

October Term, 1994

STATE OF OKLAHOMA, *Ex Rel.*
OKLAHOMA TAX COMMISSION,

*Petitioner,*

v.

JEFFERSON LINES, INC.,

*Respondent.*

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

## MOTION FOR LEAVE TO FILE BRIEF, AND ACCOMPANYING BRIEF, OF GREYHOUND LINES, INC., AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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41P

## MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

Pursuant to Rule 37.4 of the Rules of this Court, Greyhound Lines, Inc. ("Greyhound") respectfully moves this Court for leave to file the attached brief as *amicus curiae* in this case. Counsel for Respondent, Jefferson Lines, Inc., has consented to the filing of this brief, but counsel for Petitioner, the State of Oklahoma, *ex rel.* Oklahoma Tax Commission (the "Oklahoma Tax Commission"), has declined to consent.

Greyhound operates in the State of Oklahoma and throughout the continental United States as a common carrier providing transportation by bus. Greyhound is the largest provider of bus transportation services in the country and is the only nationwide provider of intercity bus transportation services. Greyhound provides transportation on both intrastate and interstate routes in and through Oklahoma and issues tickets in Oklahoma for transportation originating and terminating in and outside of Oklahoma.

On June 4, 1990, Greyhound and certain of its affiliates filed voluntary petitions for relief under chapter 11 of title 11 of the United States Code in the United States Bankruptcy Court for the Southern District of Texas, Brownsville Division (the "Bankruptcy Court"), under case numbers 90-00985-B-11 to 90-00990-B-11. In Greyhound's reorganization case, the State of Oklahoma Tax Commission, the Petitioner herein, filed, *inter alia,* a proof of claim in the amount of $906,866.59, which represents an assessment of tax on the proceeds received by Greyhound for tickets issued in Oklahoma during the period

June 1, 1987, to May 31, 1990, except those proceeds on which Greyhound previously had remitted tax and proceeds that Petitioner had determined to be exempt from taxation. As in the instant case, the basis of such proof of claim is that Petitioner asserts that sales taxes are assessable on all transportation tickets "sold" within the State of Oklahoma, whether for intrastate or interstate transportation. In the litigation on the Oklahoma Tax Commission's claim, the Oklahoma Tax Commission and Greyhound stipulated that the Oklahoma Tax Commission was seeking to tax proceeds from all of the following transportation services:

- intrastate routes wholly within the State of Oklahoma;
- intrastate routes wholly within a state other than Oklahoma;
- interstate routes that commence in Oklahoma and terminate in another state;
- interstate routes that commence and terminate in Oklahoma, but pass through another state; and
- interstate routes wholly outside the State of Oklahoma.

In its bankruptcy case, Greyhound objected to Petitioner's claim against it on the same ground as is presented in the instant case, *viz.* that the Oklahoma sales tax statute, as interpreted and applied by Petitioner, is unconstitutional. On February 5, 1993, the Bankruptcy Court sustained such objection and entered an order disallowing the claim of Petitioner. A copy of such order is included as Appendix "A" to Respondent's brief in this



case. On appeal by Petitioner, the United States District Court for the Southern District of Texas, in case number B-93-58 and by order dated October 4, 1993, affirmed the Bankruptcy Court's decision. A copy of such order is included as Appendix "B" to Respondent's brief in this case. Petitioner further appealed the district court's decision to the United States Court of Appeals for the Fifth Circuit. After full briefing and oral argument, but before such court rendered its decision, this Court granted Petitioner's petition for a writ of *certiorari*. As a result, the court of appeals entered an order staying any decision on the issues before it until after a decision is handed down in this case.

Because this Court's interpretation of the Oklahoma sales tax statute at issue in this case will be controlling with respect to claims asserted by Petitioner against Greyhound, Greyhound has a strong interest in the outcome of this case. Moreover, as the largest provider of bus transportation services and the only such provider that operates nationwide, the effects of a decision in this case will be felt by Greyhound and its customers more than any other party, including Respondent.

WHEREFORE, Greyhound respectfully requests that this Court grant Greyhound leave to file the annexed brief as *amicus curiae*.

Respectfully submitted,

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## QUESTION PRESENTED

Does the sales tax imposed by Okla. Stat. tit. 68, § 1354(1)(C) on the gross proceeds received for tickets issued within Oklahoma for interstate transportation services to be provided in whole or in part outside the State of Oklahoma violate the Commerce Clause and/or the Due Process Clause where (i) the State's only nexus with such transportation services is that the ticket evidencing the right to receive such services was either issued or paid for in the State, and (ii) the State fails to apportion the proceeds from such sale of interstate transportation services, which more than one state may tax?

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## INTEREST OF THE *AMICUS CURIAE*

The interest of the *amicus curiae*, Greyhound Lines, Inc. ("*Amicus* Greyhound"), is set forth in the motion accompanying this brief.

## SUMMARY OF ARGUMENT

Under the test adopted by the Court in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), a tax on interstate commerce must satisfy four requirements: (i) the tax must be applied to an activity with a substantial nexus with the taxing state, (ii) the tax must be fairly apportioned, (iii) the tax must not discriminate against interstate commerce, and (iv) the tax must be fairly related to the services provided by the taxing state. *Amicus* Greyhound agrees with and adopts the argument of Respondent that the Oklahoma sales tax statute fails all four prongs of this test, and, therefore, must be invalidated as violative of the Commerce Clause, U.S. Const. art. I, § 8, cl. 3.

Moreover, the constitutional defects of the Oklahoma sales tax statute strike at the two fundamental constitutional principles that underlie the Court's test in *Complete Auto* and its predecessors: (i) that, whether as a matter of application of the Due Process Clause, U.S. Const. amend. XIV, or application of the Commerce Clause, a state must have a sufficient nexus with an activity being taxed to confer constitutional authority on such state to tax all or a portion of such activity, and (ii) that, pursuant to the Commerce Clause, the tax must not discriminate against interstate commerce.

1. Petitioner, the State of Oklahoma, *ex rel.* Oklahoma Tax Commission (the "Oklahoma Tax Commission"), and *Amici Curiae* National Conference of State Legislatures, *et al.* ("National Conference *Amici*") seek to have the Court accept the seemingly simple proposition that the State may so define a transaction as to confer authority upon the State to tax the *entire* value of all activities that comprise such transaction. Such an approach, however, elevates labels over the substance of the taxing statutes and the transactions being taxed, thereby eviscerating the limits upon a state's taxing authority that the Court consistently has recognized. By basing its authority to tax the full value of interstate transportation services on a tautological claim that a "sale" occurs in Oklahoma if a ticket is purchased in that State without regard to whether the transportation services to be provided originate, terminate, or occur wholly outside of Oklahoma, the Oklahoma Tax Commission stretches the requirement of a nexus beyond any notion of sufficient contacts that previously has been accepted by the Court or even the state courts that have applied constitutional principles in order to police the statutes of their own state.

The contacts that are required before a state may tax the full value of a transaction are different, and more substantial, than those required for a state to impose an administrative duty on an entity. The arguments of Petitioner that even minimal contacts are sufficient to permit taxation of the full value of activities bearing little or no relation to the taxing state would create a new theory of law under the Commerce Clause and the Due Process Clause, with far reaching effects upon commercial transactions.



2. If the Court does permit a state to tax the full value of a transaction by virtue of a single act within the state, the Court will be opening the door to multiple taxation of a unitary figure by states, without imposing any compensating requirement that such taxation be apportioned. In the absence of a principle that looks to the decisions of the Court, not state-created labels, to define taxable transactions, multiple taxation of interstate transactions by states with tenuous connections to the transactions is almost certain to occur. Especially where, as in the case *sub judice*, the State never even attempts to apportion its tax or to credit any additional taxes that may be imposed on the taxpayer, the statute on its face and by its effect imposes a higher cost on the purchaser of interstate goods and services than on one dealing in a wholly intrastate transaction. Therefore, the Oklahoma sales tax statute is discriminatory and violates the Commerce Clause.

3. Moreover, the sales tax at issue is constitutionally indistinguishable from the gross receipts tax that the Court invalidated in *Central Greyhound Lines, Inc. v. Mealey*, 334 U.S. 653 (1948). As a result, the Oklahoma sales tax statute should be invalidated on *stare decisis* grounds.

## ARGUMENT

Pursuant to title 68, section 1354 of the Oklahoma Statutes, the Oklahoma Tax Commission has sought to collect from Respondent and from *Amicus* Greyhound the full value of proceeds received from the issuance of all bus transportation tickets in Oklahoma.[1] Although the Oklahoma sales tax statute defines a "sale" as occurring when services are furnished or rendered,[2] for purposes of this case, Petitioner and National Conference *Amici* have interpreted a "sale" under section 1354(1)(C) as occurring either upon the issuance of a bus transportation ticket or the payment for such ticket. As a result, the Oklahoma Tax Commission asserts a right to tax the full

[1] Okla. Stat. tit. 68, § 1354 (Supp. 1988) provides, in pertinent part, as follows:

> (1) There is hereby levied upon all sales, not otherwise exempted in the Oklahoma Sales Tax Code, an excise tax of four percent (4%) of the gross receipts or gross proceeds of each sale of the following:
>
> * * *
>
> (C) Transportation for hire to persons by common carriers, including railroads both steam and electric, motor transportation companies, taxicab companies, pullman car companies, airlines, and other means of transportation for hire;
>
> * * *

[2] Pursuant to Okla. Stat. tit. 68, § 1352(L)(4), "sale" is defined with respect to services as "[t]he furnishing or rendering of services taxable under this article."



value of all proceeds received from so-called sales in Oklahoma of tickets. In fact, in the bankruptcy case of *Amicus* Greyhound, the Oklahoma Tax Commission stipulated that it seeks to tax proceeds from all of the following transportation services:

- intrastate routes wholly within the State of Oklahoma;
- intrastate routes wholly within a state other than Oklahoma;
- interstate routes that commence in Oklahoma and terminate in another state;
- interstate routes that commence and terminate in Oklahoma, but pass through another state; and
- interstate routes wholly outside the State of Oklahoma.

Under the definition of "sale" created by the Oklahoma Tax Commission – which purports to give the Oklahoma Tax Commission the authority to tax the full value of the foregoing transportation services so long as tickets for them are issued and/or paid for in Oklahoma – the Oklahoma sales tax statute violates the Due Process Clause and the Commerce Clause.

In *Complete Auto*, the Court developed its latest test for determining the constitutionality of a state tax under the Commerce Clause. Under that test, a tax on interstate commerce is valid if it satisfies four requirements: (i) the tax is applied to an activity with a substantial nexus with the taxing state; (ii) the tax is fairly apportioned; (iii) the tax does not discriminate against interstate commerce, and (iv) the tax is fairly related to the services provided

by the taxing state. 430 U.S. at 279. As set forth by Respondent, under such test, the Oklahoma sales tax statute is constitutionally defective. *Amicus* Greyhound agrees with such analysis and wholly adopts it.

A more narrow focus on the two principal underpinnings of the *Complete Auto* test, however, demonstrates that the Oklahoma sales tax statute, as interpreted and applied by Petitioner, violates the constitutional principles that lie at the heart of the *Complete Auto* test: (i) under principles of due process and pursuant to the Court's Commerce Clause decisions, a state's power to tax transactions is restricted to "taxable transactions" occurring within the state, and (ii) under the Commerce Clause, the state may not pass a tax or regulation that, either on its face or in its effect, discriminates against interstate commerce. Under these two essential constitutional principles, the Oklahoma sales tax statute does not pass constitutional muster.

## I. The Oklahoma Tax Commission, By Seeking to Tax Transactions That May Occur Wholly Outside of Oklahoma, Is Taxing Beyond Its Constitutionally Permissible Boundaries.

Throughout the permutations of the Court's test under the Commerce Clause, the Court has focused repeatedly on the scope of a state's authority to tax transactions. In its early cases, the Court focused simply on "the limits of state power" and whether activities and transactions sought to be taxed were "made beyond the state limits." *McLeod v. J.E. Dilworth Co.*, 322 U.S. 327,



329-31 (1944). In the wake of *Complete Auto*, a state's authority to tax is determined by reference to whether "the tax is applied to an activity with a substantial nexus with the taxing State . . . and is fairly related to the services provided by the State." 430 U.S. at 279. In *Quill Corp. v. North Dakota*, 112 S. Ct. 1904, 1919 (1992), Justice White, concurring in part and dissenting in part, argued that the doctrinal origins for *Complete Auto's* nexus requirement derive from the fairness inquiry required by the Due Process Clause and that the *Complete Auto* nexus requirement simply seeks to determine whether the activity being taxed has a "sufficient connection to the State to give 'jurisdiction to tax.' " (*quoting Freeman v. Hewit*, 329 U.S. 249, 271 (1946)). *See also United Air Lines v. Mahin*, 410 U.S. 623, 640 (1973) ("under the Due Process Clause of the Fourteenth Amendment, Illinois has no jurisdiction to tax the use of property occurring in another State.") (White, J., dissenting); *Memphis Natural Gas Co. v. Stone*, 335 U.S. 80, 96-97 (1948) (Rutledge, J., concurring) (noting that, *inter alia*, franchise tax on the value of capital invested or employed in the taxing state was "clearly within the state's power to lay insofar as any limitation of due process or 'jurisdiction to tax' in that sense is concerned."). That the *Complete Auto* test, at a minimum, resembles a due process analysis is also seen by its characterization by the Court as "a fair measure of the State's contacts with a given commercial transaction." *Itel Int'l Containers Corp. v. Huddleston*, 113 S. Ct. 1095, 1104 (1993). Under any statement of the principle or its origins, in considering the constitutionality of states' efforts to tax, the Court has not relied upon states' characterizations of their own taxes, but has made its own determination of

what constitutes the "taxable transaction," what contacts the state has with such taxable transaction, and whether such contacts are sufficient to justify imposition of the tax on that transaction by the state. This approach has been fundamental to the Court's consideration of state taxes on interstate commerce throughout the years.

### A. In Determining the Nature and Validity of a Tax, the Court Looks Beyond State-Created Labels to the Nature of the Activity Being Taxed.

In determining the nature and validity of a tax, the Court has inquired into the practical effect of a tax and has refused to allow labels created by the state or by the parties to the transaction to govern the Court's own characterization of the nature of the tax and the transaction. In *Complete Auto*, the Court signalled its intent to look beyond "the formal language of the tax statute" and to focus instead on "its practical effect." 430 U.S. at 279. The Court reemphasized that principle in *Trinova Corp. v. Michigan Dept. of Treasury*, 498 U.S. 358, 374 (1991), in which it stated that, simply because the state had labelled its single business tax as a tax on "business activity" did "not permit [the Court] to forgo examination of the actual tax base and apportionment provisions. . . . 'A tax on sleeping measured by the number of pairs of shoes you have in your closet is a tax on shoes.' " (*quoting* Jenkins, *State Taxation of Interstate Commerce*, 27 Tenn. L. Rev. 239,



242 (1960)).[3] *See also Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979) ("when considering the purpose of a challenged statute, this Court is not bound by the 'name, description or characterization given it by the legislature or the courts of the State,' but will determine for itself the practical impact of the law.") (*quoting Lacoste v. Louisiana Dept. of Conservation*, 263 U.S. 545, 550 (1924)).

Likewise, that Petitioner and National Conference *Amici* have characterized the Oklahoma sales tax statute as a "garden-variety" tax on a transaction that they characterize as wholly local in character is not binding on the Court and not determinative of the true nature of the tax. That Petitioner and National Conference *Amici* claim that the Oklahoma Tax Commission is seeking to impose a tax "only" on the local transaction of the "sale" of a bus transportation ticket does not determine whether Oklahoma, in fact, has the authority to impose a tax on the full value of transportation services without regard to where such services are being rendered. To accept otherwise would be to allow a state to select an arbitrary point at which a transaction intersects with the state and to hobble interstate commerce by defining such activity as a wholly-local "taxable transaction" to support taxation of the full value of a transaction. Not only would such an approach likely inspire states to new heights of legislative

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[3] Although Petitioner may argue that the Oklahoma sales tax statute is a tax on a ticket measured by the value of the ticket, such an argument should be summarily rejected because the ticket has no intrinsic value; it is merely evidence of the right to receive the transportation services from which the price of the ticket is derived. *See infra* p. 14.

creativity,[4] but such an approach also would be directly contrary to how this Court previously has analyzed and reviewed state taxing statutes.

### B. Sufficient Contacts to Impose a Sales Tax Only Exist in the Jurisdiction Where the Goods Are Delivered or the Services Are Rendered.

This Court, as have numerous state courts interpreting their own statutes, has determined that a "sales tax is a tax on the *receipt* of that which was purchased." *McLeod*, 322 U.S. at 334 (emphasis added). As a result, the Court has required a "taxable transaction" to occur in the state seeking to impose a sales tax and has defined a taxable transaction upon which a sales tax can constitutionally be imposed as the "transfer of possession to the purchaser within the state, which is the taxable event regardless of the time and place of passing title." *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U.S. 33, 49 (1940).

In *Berwind-White*, the Court specifically distinguished New York City's sales tax on coal delivered to New York City but mined in Pennsylvania by a Pennsylvania corporation from an unapportioned gross receipts tax that was found to be unconstitutional in *Adams Mfg. Co. v. Storen*,

[4] For example, under the view of Petitioner and National Conference *Amici*, a state presumably could define a "sale of services" as occurring upon the (i) entry of the parties into a contract, (ii) payment under the contract, or (iii) delivery of services under the contract, whichever activity first occurs within the state, and, because the state simply was seeking to impose a "local" sales tax, it could tax the entirety of the transaction, even though at least two other states could also claim a right to impose a sales tax under such definition.



304 U.S. 307 (1938), on the grounds that "the tax is conditioned upon a local activity delivery of goods within the state upon their purchase for consumption." *Berwind-White*, 309 U.S. at 58. In contrast, in *Adams*, a state sought to impose a gross receipts tax on a company's *entire* income notwithstanding that 80% of that income was derived from goods delivered out-of-state. *Adams*, 304 U.S. at 308-09. The Court in *Adams*, in discussing another tax, specifically noted that, "[i]f the tax there had been a sales tax the city could not have measured it by sales consummated in another state." *Id.* at 313.

In *McLeod*, the Court invalidated the imposition of a sales tax by Arkansas on an interstate purchase of goods because the goods were received by the buyer's agent (the shipper) in Tennessee, and the sale, therefore, occurred in Tennessee, 322 U.S. at 330. *See also McGoldrick v. Felt & Tarrant Mfg. Co.*, 309 U.S. 70, 76-77 (1940) (on the basis of *Berwind-White*, upholding New York City's sales tax on orders taken within New York City and possession of which was transferred there, even though orders were approved in different states and remittances were made out-of-state). In *International Harvester Co. v. Department of Treasury*, 322 U.S. 340, 347-48 (1944), the Court upheld a gross receipts tax on the proceeds from various interstate transactions, all of which had as their common denominator the agreement to sell *and* the delivery of goods within Indiana, noting that there was no "constitutional difference" between such case and *Berwind-White*. *Id.* at 348. In doing so, though, the Court attached significance to the fact that the "taxable transaction" was "at the *final stage* of an interstate movement" and that Indiana simply sought "to tax gross receipts from interstate transactions

*consummated* within its borders." *Id.* at 347-49 (emphasis added).

Since *Berwind-White*, it has been treated as axiomatic that the mere purchase in a state – without the actual delivery in the state – is not sufficient to justify imposition of a sales tax by such state. In other words, "an out-of-state buyer who purchases goods in New York City and takes them with him pays the tax, while if he has them shipped to him, he pays no sales tax." *United Air Lines*, 410 U.S. at 637 (Douglas, J., dissenting). *See also Evco v. Jones*, 409 U.S. 91, 93 (1972) (New Mexico could not include income of New Mexico business from sales of tangible personal property out-of-state in assessing gross receipts tax because "a tax levied on the gross receipts from the sales of tangible personal property in another State is an impermissible burden on commerce").[5] By imposing a sales tax based solely upon the issuance of a ticket or the receipt of payment, and wholly without connection to the actual delivery of that which was purchased (*i.e.*, the bus transportation), the Oklahoma Tax Commission seeks to do precisely that.

In the context of a sale of "pure" services (*i.e.*, services other than those performed on a tangible good that comes to rest in a state, such as a computer program), the "delivery" or the "receipt" of such services occurs when

[5] Conversely, if the goods are delivered out-of-state and, therefore, not subject to a sales tax, then the state in which the goods are "used" may impose a use tax on the purchaser. *See Felt & Tarrant Co. v. Gallagher*, 306 U.S. 62, 68 (1939); *Southern Pacific Co. v. Gallagher*, 306 U.S. 167, 172 (1939); *Henneford v. Silas Mason Co.*, 300 U.S. 577, 581 (1937).



the services are provided. In the instant case, the "delivery" or "receipt" of services is complete only when a passenger arrives at his or her destination. Nevertheless, the Petitioner claims that the Oklahoma sales tax statute may constitutionally tax the entire value of such service even if no part of such delivery or receipt occurs within Oklahoma.[6] All that a consumer "purchases" when he or she receives a bus transportation ticket in Oklahoma, however, is the right to enjoy the transportation services provided by the bus company issuing the ticket. As such, the transaction bears more resemblance to the purchase of a commodity that will be shipped interstate to the purchaser than to the transaction in which the commodity is delivered within the taxing state. In fact, unlike the purchase of a commodity in which the purchaser may elect to take delivery either in the taxing state or out of the taxing state, here the "good" being purchased is interstate transportation itself, and interstate commerce is a necessary component of the transaction.

Notwithstanding the extended history of cases of this Court that focus on the delivery of commodities as the sole taxable transaction that confers jurisdiction upon a state to impose a sales tax, Petitioner and National Conference *Amici* argue that, for purposes of imposing a sales tax, the taxable transaction is *not* delivery, but some ill-defined event that they call a "sale." This tautological

[6] Although, as cited in *supra* note 2, the Oklahoma sales tax statute defines a sale of services as occurring upon the "furnishing or rendering of services," the Oklahoma Tax Commission has chosen not to accept the literal terms of the statute and has instead created its own concept of "sale."

approach attempts to imbue the issuance of a "receipt" with such a significance that the sale of interstate transportation magically is transformed into a wholly intrastate transaction.

The Eighth Circuit Court of Appeals in this case, however, correctly recognized that the item being taxed by the Oklahoma Tax Commission is not the "intrastate" transaction of paying for a mere bus ticket, but the right to receive such service:

> In essence, the Commission argues that the taxable activity is the sale of a ticket, not of transportation. This argument is too technical and flies in the face of how bus-ticket prices are set. A ticket price is set, at least partially, on the number of miles travelled. To say that only the purchase of a ticket is taxed, and not the use of the ticket, ignores the fact that the real value of the ticket is the right to ride a bus. The ticket without the travel would be of scant value to a customer. We will not separate the sale of a piece of paper from the service which it represents. To hold otherwise would elevate form over substance and require this Court to ignore economic realities.

*In re Jefferson Lines, Inc.*, 15 F.3d 90, 92 (8th Cir. 1994). Nearly fifty years ago, the Court, in invalidating a state tax on the gross receipts of a bus company because the state sought to tax receipts relating to transportation outside the state's borders, rejected a similar attempt to characterize interstate bus transportation as a local transaction:

> Of course we are dealing here with "interstate commerce." . . . In a case like this, nothing is



> gained, and clarity is lost, by not starting with recognition of the fact that it is interstate commerce which the State is seeking to reach and candidly facing the real question whether what the State is exacting is a constitutionally fair demand by the State for that aspect of the interstate commerce to which the State bears a special relation.

*Central Greyhound Lines, Inc. v. Mealey*, 334 U.S. 653, 661 (1948).

The characterization of the mere issuance of or payment for a bus ticket as the "sale" of transportation and the "taxable transaction" upon which a state sales tax may constitutionally be predicated is not only inapposite to *Central Greyhound* and the Court's decisions relating to the taxation of commodities, but it also is contrary to the analysis the Court has adopted in the few cases in which it has addressed the sale of services. In *Goldberg v. Sweet*, 488 U.S. 249, 256 (1989), a tax by the State of Illinois on interstate telecommunications required both that the telecommunications (i) either have originated or terminated in the State *and* (ii) be charged to a service address in the State. Although all parties agreed that the State had a sufficient nexus with the taxed interstate telecommunications, in response to the concern of multiple taxation, the Court stated its view that only two states would have a substantial enough nexus to tax a consumer's purchase of an interstate telephone call:

> The first is a State like Illinois which taxes the origination or termination of an interstate telephone call charged to a service address within that State. The second is a State which taxes the

origination or termination of an interstate telephone call billed or paid within that State.

*Id.* at 263. Thus, under *Goldberg*, the Court would require *both* that the services performed relate to the taxing state (*i.e.*, origination or termination of the telephone call) *and* that there be a connection with the taxpayer (*i.e.*, maintenance of a service address within the taxing state, receipt of bills within the taxing state, or paying bills within the taxing state) in order for a state to impose a valid tax on interstate services.

In *Itel*, the Court addressed the permissibility of a sales tax imposed by the State of Tennessee on the proceeds derived from the lease of cargo containers delivered in Tennessee. In upholding the tax against a challenge that it violated, *inter alia*, the foreign commerce clause, the Court stressed that the tax was not a tax on goods, "but a tax on a business transaction occurring within the taxing State. . . . Tennessee's sales tax is levied on leases transferring temporary possession of containers to third parties in Tennessee. . . . " 113 S. Ct. at 1106. The Court considered this taxable business transaction, which may have been negotiated in a different state and payment for which may even have been remitted to a different state, to be a "discrete transaction occurring within the State" simply because the lessor's performance under the lease – the delivery of the cargo containers – occurred in Tennessee. *Id.* at 1098, 1104. *See also Complete Auto*, 430 U.S. at 275 n.2 (specifically noting that the tax on the gross proceeds of sales "has been applied only to commercial transactions in which a distinct service is performed and payment made for transportation from one point within the State to another point within the State."); 



*Dept. of Treasury v. Ingram-Richardson Mfg. Co.*, 313 U.S. 252, 255 (1941) (upholding taxation of gross receipts received from enamelling process performed within the state on items belonging to out-of-state customers because the enamelling services were performed entirely intrastate, and interstate transportation was "but incident to that intrastate business"); *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250, 260 (1938) (upholding state's tax on amounts received from the sale of advertising space in a trade journal where all the services upon which the tax was based – the preparation, printing, and publication of the advertising – and the receipt of the consideration occurred in the taxing state and not elsewhere).[7]

[7] In policing their own statutes, state courts also have viewed the taxable event, for purposes of determining whether a sales tax was constitutional, as the time of delivery of the services. *See Union Pac. R.R. Co. v. Auditing Div.*, 842 P.2d 876, 882 (Utah 1992) (noting that Utah imposes a sales tax on certain services that occur in Utah and a compensating use tax on services performed out-of-state on property that comes to rest in Utah); *LeTourneau Sales & Serv., Inc. v. Olsen*, 691 S.W.2d 531, 536 (Tenn. 1985) (a tax imposed on repair services performed in Tennessee for out-of-state customers was constitutionally permissible where the "service was performed in Tennessee and the transaction was taxed as a service and not a sale. . . . The taxable event is the rendering of repair services in Tennessee."); *Corning Lab., Inc. v. Iowa State Dept. of Revenue*, 270 N.W.2d 463, 465 (Iowa 1978) (sales tax imposed on services performed for out-of-state customers was constitutional where all of the services against which the tax was levied were performed in the taxing State); *McKeigny v. Dunn Bros., Inc.*, 80 So. 2d 802, 807 (Miss. 1955) ("sales tax" on gross income derived solely from intrastate transportation is constitutional).

Because the purchased services were performed in the state seeking to impose the tax, all of such cases can fairly be characterized as "garden-variety sales taxes." In each of such cases, the interstate commerce was "but incident" to the local activity being taxed. In the instant case, however, the converse is true – the local activity, the issuance of a bus transportation ticket, is "but incident" to the interstate commerce, the very "commodity" being sold, the very service that is being taxed. By taxing the entire price of a transportation ticket for travel from, for example, New York to California, on the sole basis that the transportation ticket was issued from an office in Oklahoma, the Oklahoma sales tax is anything but a "garden-variety tax."

### C. In the Absence of a Sufficient Nexus Between an Activity to Be Taxed and a Taxing Jurisdiction, the State Lacks Constitutional Authority to Impose a Tax on the Activity.

To adopt a test that permits a state to tax interstate transportation services by allowing the state to define a taxable transaction as occurring where a ticket is issued or payment is made would establish so novel and minimal a requirement of sufficient nexus in the context of interstate commerce as to invite states to engage in creative exercises to extend the reach of their taxing authority. If the Court were to hold that issuance of a ticket or payment therefor constitutes an appropriate nexus for taxing the entire value of a sales transaction, then it also necessarily would have to conclude, contrary to well-settled expectations, that the full value of an in-state purchase of goods to be shipped out-of-state similarly



would be subject to the imposition of a sales tax by the state in which the purchase was made.[8]

It is clear, though, that the standard for determining if a state can constitutionally tax a particular activity (*i.e.*, whether a state has a sufficient "nexus," whether a state has sufficient "contacts" to tax a transaction, or whether a state has "jurisdiction to tax") differs from the standard for determining whether, assuming a perfectly valid tax, the state can impose a duty to collect the tax. As such, the due process analysis employed by the Court in *National Geographic Soc'y v. California Bd. of Equalization*, 430 U.S. 551 (1977), and relied upon by Petitioner is inapplicable to the instant case. In *National Geographic*, the sole issue before the Court was whether a corporation that maintained offices in California could be required by the State of California to collect use taxes imposed against California residents who purchased the corporation's products even though the corporation's activities in California were unrelated to the activities for which the tax was imposed. *Id.* at 554. No one disputed whether the tax – as here, a tax on the purchaser, not the seller – could be imposed on the purchaser. *Id.* at 555. Likewise, no one

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[8] Of course, that is not to say that, if the activity that the State wishes to tax is literally the issuance of a receipt within that State, the State does not have a sufficient nexus to tax such activity; the State simply does not have a sufficient nexus to tax the full value of all activities related to that isolated event. To the extent of the value of such activity, the State could have a sufficient nexus to impose a tax; however, the receipt itself has no intrinsic value, and, therefore, the value of the activity on which such tax could be based would be *de minimis*.

disputes that Respondent, *Amicus* Greyhound, and other similarly situated companies could be required to (and, in fact, do) collect taxes on behalf of the State of Oklahoma and remit them to the State. Whether the State may constitutionally impose such taxes, however, is a different issue, and, as the Court recognized in *National Geographic*, whether the State may constitutionally impose such taxes requires a more stringent level of review. *See id.* at 560 ("However fatal to a direct tax a 'showing that particular transactions are dissociated from the local business' . . . such dissociation does not bar the imposition of the use-tax-collection duty.") (citations omitted).

Under the *National Geographic* test, the Court examines the contacts between the *entity* collecting the tax and the taxing state, whereas, under the *Complete Auto* test the Court examines the contacts between the *activity* sought to be taxed and the taxing state. Even if both tests ultimately derive from a due process analysis, "[i]t is the nature of the state's action that determines the kind or degree of activity in the state necessary for satisfying the requirements of due process." *Travelers Health Ass'n v. Virginia*, 339 U.S. 643, 653 (1950) (Douglas, J., concurring).

## II. The Oklahoma Tax Commission's Attempt to Tax the Entire Value of Transactions Involving Interstate Transportation Without Regard to the Limited Nature of Oklahoma's Contact with the Transactions Is Plainly Discriminatory.

Whether under the fourth prong of *Complete Auto* or under the general Commerce Clause jurisprudence developed by the Court, it is clear that a statute is discriminatory, and, therefore, unconstitutional, when, like the



Oklahoma sales tax statute, more than one state has taxing jurisdiction over the activity taxed, and the state taxes a unitary figure without apportionment, without varying the tax directly with some proxy for value obtained from the state. *American Trucking Ass'ns v. Scheiner*, 483 U.S. 266, 291 (1987); *Western Live Stock*, 303 U.S. at 255 ("local taxes, measured by gross receipts from interstate commerce, have often been pronounced unconstitutional. . . . [T]hey have placed on the commerce burdens of such a nature as to be capable in point of substance, of being imposed . . . with equal right by every state which the commerce touches, merely because interstate commerce is being done, so that without the protection of the commerce clause it would bear cumulative burdens not imposed on local commerce.") (citations omitted); *Berwind-White*, 309 U.S. at 57 ("a state tax upon the operations of interstate commerce measured either by its volume or the gross receipts derived from it has been held to infringe the commerce clause, because the tax if sustained would exact tribute for the commerce carried on beyond the boundaries of the taxing state, and would leave each state through which the commerce passes free to subject it to a like burden not borne by intrastate commerce.").

At least as early as the *Adams* case, the Court recognized the constitutional problems associated with a tax on a unitary figure, such as gross receipts from a sale, that does not provide an apportionment formula:

> The vice of the statute as applied to receipts from interstate sales is that the tax includes in its measure, without apportionment, receipts derived from activities in interstate commerce;

> and that the exaction is of such a character that if lawful it may in substance be laid to the fullest extent by states in which the goods are sold as well as those in which they are manufactured. Interstate commerce would thus be subjected to the risk of a double tax burden to which intrastate commerce is not exposed, and which the commerce clause forbids.

304 U.S. at 311 (footnotes omitted). *Compare, Trinova*, 498 U.S. at 387 (upholding Michigan's form of value-added tax, which provided a formula for attributing value to the State). The Oklahoma sales tax statute makes no attempt to apportion any of the tax on the sale of transportation services to the value of the actual services provided in the State – even if it merely is the value of the services relating to supporting ticket offices, as compared to the value of the transportation services themselves – or any credit for other taxes imposed on the passenger taxpayer by other taxing jurisdictions. Consequently, the Oklahoma sales tax statute, even if it is found to have a sufficient nexus with the activity taxed to confer authority on Oklahoma to tax such activity, is not constitutionally permissible.

Moreover, if the Oklahoma sales tax on interstate transportation is considered to have a sufficient nexus with Oklahoma to enable Oklahoma to tax the full value of transportation services occurring wholly outside the borders of Oklahoma, then the risk of multiple taxation of purchasers of interstate transportation is increased and becomes much more significant. Upholding the Oklahoma sales tax statute under such a liberal nexus standard and without requiring apportionment would provide a green light to states to "export tax burdens and import tax revenues" without providing any "practical or



theoretical justification" for doing so. *Trinova*, 498 U.S. at 374. For example, based upon a limited nexus requirement, a state might seek to tax the entire value of transportation services at any of the following points:

- the state of origination;
- the state of destination;
- any state through which the bus travels;
- the state in which the ticket is issued; or
- the state in which the consideration passes.

Under the liberal nexus standard proposed by Petitioner and National Conference *Amici*, in each such case the state may argue that a "taxable transaction" occurred because the delivery or receipt of services occurred in such state for which the state has provided related services – police and fire protection for the travelling passengers, the bus terminals, and the rest stops and maintenance of the state's highways are but two services upon which such a state could claim that the tax is "fairly related" to the services provided. Moreover, if minimum contacts with the taxpayer are all that is constitutionally required to impose a tax, the state in which a passenger resides (even if the bus does not pass through such state) might be said to have sufficient contacts to impose a tax on the passenger.

Although apportioned taxation by multiple states with connections to a transaction is not necessarily objectionable, a decision that upholds a tax, such as the Oklahoma sales tax, that taxes the full value of transportation services without even requiring that any portion of such services be performed in the taxing state would provide

little incentive for other states to apportion taxes in these situations. Such a decision would provide little, if any, constitutional barrier for states in which the services actually are rendered from similarly taxing the full value of such services based upon some state-created concept of a purely "local" transaction.

Petitioner and National Conference *Amici* suggest that no risk of multiple taxation exists because (i) any tax imposed by other states would not be called a "sales tax," and (ii) any tax imposed by other states would be imposed on a different taxpayer (*i.e.*, the transportation carrier, not the passenger). Unfortunately, that is not the case. If the Court accepts the proposition that a state constitutionally may apply its own label and thereby transform a transaction into a "sale" without requiring the delivery of goods or services, little prevents states from applying their own definitions of "sales" to transactions. Moreover, even absent such actions by other states, passengers clearly would be subject to use taxes in every state that could claim that some portion of the transportation services are "used" in that state.[9] Whether such

[9] An example of a sales and use tax on transportation services can be found in the short-lived tax on services enacted by the State of Florida legislature on July 1, 1987, and repealed by the legislature effective January 1, 1988. Pursuant to Fla. Stat. ch. 212.059(5) (repealed 1988), transportation services were considered sold and used according to the following rules of interpretation:

> (a) Interstate and international transportation services shall be considered sold or used in this state to the extent that the sales price or cost price of the service is apportioned to this state pursuant to paragraph (b).
>
> (b) The sales price of the sale of interstate or international transportation services, or the cost price of the use of interstate or international transportation services,



additional taxes are denominated "use" or "sales" taxes should not be relevant for purposes of determining the risk of multiple taxation because it is recognized that a use tax is simply a compensatory tax for a state that does not otherwise have the constitutional nexus to impose a sales tax. *Henneford*, 300 U.S. at 581.

> shall be apportioned to the state as provided in this paragraph. There shall be included in the measure of the tax imposed by this part on the sale or use of interstate or international transportation services one-half of the sales price or cost price of the Florida service provider if the point of origin of the transportation service is in Florida, and one-half of said price if the point of termination is in Florida for the service transaction in question. For purposes of this paragraph:
>
> 1. "Florida service provider" means the person providing transportation services in Florida regardless of the commercial domicile of such person; and
>
> 2. "Point of origin" and "point of termination" mean the physical location at which the Florida service provider begins or ends movement of the property which is being transported, respectively.

Purely intrastate transportation was covered under Fla. Stat. ch. 212.0591(9) (repealed 1988), which provided, in pertinent part, as follows:

> For purposes of determining where the benefit of the service is enjoyed, the following provisions shall be applicable:
>
> (a) If the purchaser is an individual not acting as a business, and:
>
> * * *
>
> 3. . . . [T]he benefit of the service shall be presumed to be enjoyed where the greater proportion of the service is performed, based on costs of performance.

In short, because the Oklahoma sales tax statute does not allocate the sales tax by miles travelled within Oklahoma, the interstate traveller necessarily is paying more for each mile of services, if any, rendered within Oklahoma than the passenger who limits his or her travel to within the boundaries of Oklahoma.[10] As such, the Oklahoma sales tax statute is "plainly discriminatory." *Scheiner*, 483 U.S. at 286. The only alternative to avoid multiple taxation where tangential nexuses such as Petitioner's are permitted and where states such as Petitioner do not voluntarily allocate or provide credits for other state taxes, is to impose upon courts the burden of determining which state may more properly tax an entire transaction, a task that courts simply are not suited to perform.

Moreover, no justification exists for not requiring apportionment in a situation, such as the one presented here, in which the Court already has recognized the feasibility of apportioning a tax based upon actual miles travelled within a state. *See Central Greyhound*, 334 U.S. at 663. Only in the limited circumstances presented in *Goldberg* did the Court find apportionment unnecessary. There, the Court found that the risk of multiple taxation was limited because (i) only two states would have a

[10] Unlike in *Central Greyhound*, in neither the instant case nor *Amicus* Greyhound's case has any party agreed that the Oklahoma sales tax statute can, as a matter of state law, be construed to provide for apportionment. *See Central Greyhound*, 334 U.S. at 664. Therefore, if the Oklahoma sales tax statute is invalidated, absent a determination that the Oklahoma sales tax statute may be interpreted to provide for apportionment as a matter of Oklahoma law, the Oklahoma Tax Commission should not be permitted to "reform" its statute retroactively.



sufficient nexus to tax the transaction, (ii) unlike other cases before the Court involving the movement of goods or the instrumentalities of interstate commerce, apportionment was impracticable, and (iii) actual multiple taxation was precluded by a statutory credit provision. 488 U.S. at 264-65. Indeed, the Court specificallv distinguished *Goldberg* from *Central Greyhound*, an interstate bus transportation case that is virtually indistinguishable from the instant case, on the ground that *Central Greyhound* "dealt with the movement of large physical objects over identifiable routes, where it was practicable to keep track of the distance actually traveled within the taxing State." *Id.* at 264.

### III. Because the Instant Case Is Virtually Indistinguishable from *Central Greyhound*, the Tax Should Be Invalidated on *Stare Decisis* Grounds.

In analyzing state taxes on Commerce Clause grounds, this Court has concluded that no constitutional distinction exists between sales taxes and taxes on gross receipts. In *International Harvester*, the Court rested its reasoning about the constitutionality of the Indiana Gross Income Tax Act, which allowed recovery of income taxes from a seller based upon its gross proceeds derived from sales in Indiana, upon its earlier cases dealing with sales taxes. The Court concluded that, for purposes of the Commerce Clause analysis, any factual differences between the two types of taxes held no constitutional significance:

> It is of course true that in the Felt & Tarrant Mfg. Co. cases taxes of different names were involved. But we are dealing in this field with

> matters of substance not with dialectics. . . . In this case as in the foregoing sales tax cases the taxable transaction is at the final stage of an interstate movement and the tax is on the gross receipts from an interstate transaction. . . . There is the same practical equivalence whether the tax is on the selling or the buying phase of the transaction. . . . Each is in substance an imposition of a tax on the transfer of property. In light of our recent decisions it could hardly be held that Indiana lacked constitutional authority to impose a sales tax or a use tax on these transactions. *But if that is true, a constitutional difference is not apparent when a "gross receipts" tax is utilized instead.*

322 U.S. at 347-48 (emphasis added). Given the similarity between gross receipts taxes and sales taxes, as discussed below, the instant case is indistinguishable from the Court's decision in *Central Greyhound*, and, therefore, the Oklahoma sales tax statute should be invalidated on *stare decisis* principles.

In *Central Greyhound*, a bus company challenged the constitutionality of imposing a New York State tax on a bus company's entire gross receipts obtained from trips that originated from a point in New York and terminated at a point in New York, but which passed through other states during the course of the trip. The Court struck down the taxing statute because the State's failure to apportion the gross receipts based upon the percentage of the actual mileage traveled within the State made "interstate transportation bear more than 'a fair share of the cost of the local government whose protection it enjoys.' " 334 U.S. at 662-63 (citations omitted). In order to pass constitutional muster, "[t]he tax may be 'fairly



apportioned' to the 'business done within the state by a fair method of apportionment.' " *Id.* at 663 (citations omitted).

*Central Greyhound* has remained as established precedent of this Court for nearly fifty years, and, as recently as the *Goldberg* decision, the Court ratified its apportionment principles as applied to bus transportation services. 488 U.S. at 264. Companies such as *Amicus* Greyhound and Respondent, which may be subject to substantial penalties if the principles of *Central Greyhound* are now discarded, are entitled to have relied upon its holding in determining whether to collect and remit taxes that, viewed in the context of *Central Greyhound*, appear constitutionally unwarranted. The Court has "long recognized that the doctrine of *stare decisis* has 'special force' where 'Congress remains free to alter what [the Court has] done.' " *Quill Corp.*, 112 S. Ct. at 1923 (Scalia, J., concurring in part and concurring in the judgment).

The facts of the instant case fall squarely within the holding in *Central Greyhound*, and, thus, the principle of *stare decisis* should be respected in this case. Pursuant to the Oklahoma sales tax statute, the Oklahoma Tax Commission seeks to tax the entire value of the interstate transportation that is being purchased, even if the interstate transportation occurs wholly outside the borders of Oklahoma. The Oklahoma sales tax statute makes no attempt to allocate the tax based upon miles traveled within Oklahoma, and it provides no credit for taxes paid to other jurisdictions. This is exactly the constitutional infirmity that the Court found in *Central Greyhound*, and *Amicus* Greyhound respectfully submits that the Court should reaffirm that holding in the instant case.

## CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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